IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
vs.	)	**No. 83237**
	)	
CARMAN L. DECK,	)	
	)	
Appellant.	)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF JEFFERSON COUNTY, MISSOURI
23rd JUDICIAL CIRCUIT, DIVISION 2
THE HONORABLE GARY P. KRAMER, JUDGE

APPELLANT'S STATEMENT, BRIEF AND ARGUMENT

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JURISDICTIONAL STATEMENT

Appellant, Carman Deck, was jury tried for two counts of first degree murder, two counts of armed criminal action, first degree robbery and first degree burglary. He was sentenced to death, two life terms and 30 and 15 years in the Circuit Court of Jefferson County. This Court affirmed his convictions and sentences on appeal. *See State v. Carmen Deck,* 994 S.W.2d 527 (Mo.banc1999).[1]

After his direct appeal, Carman filed a Rule 29.15 motion that was amended by appointed counsel. The circuit court denied the motion after an evidentiary hearing. Because a death sentence was imposed in the underlying case, this Court has jurisdiction of this Rule 29.15 appeal. Art. V., Sect. 3 and 10 (as amended 1982); Standing Order, June 16, 1988.

[1] Carman's name was misspelled at the trial court proceedings and on direct appeal.

STATEMENT OF FACTS

Carman's convictions and sentences were affirmed on direct appeal. *State v. Deck*, 994 S.W.2d 527 (Mo.banc 1999). The facts of the crime are outlined in the opinion. *Id*. at 531-32.

Carman's 29.15 motion focused on counsel's ineffectiveness in preparing and presenting mitigation at the penalty phase of trial, and other issues relating to mitigation - such as voir dire, preparing mitigating instructions and answering jurors' questions during deliberations (L.F.44-206).[2] Before the amended motion was filed, postconviction counsel moved for leave to contact jurors to investigate potential juror misconduct (L.F.30-35). An unsigned note, in the foreperson's handwriting, said "your honor, we the jury are not able to render a verdict under the law and evidence." (L.F.31,D.L.F.261). Jefferson County's Local Rule 53.3 prohibited post-trial contact without the court's permission. *Id.* The motion court denied the motion, refusing to allow any contact (L.F.37).

At the 29.15 hearing, Carman's trial and appellate counsels testified (H.Tr.69-258,36-39), as did Christine Sullivan, Tonia Cummings' attorney (H.Tr.21-36). Ms. Sullivan had represented Cummings, Carman's sister and codefendant, for the charged offense (H.Tr.22). The motion court also considered depositions in lieu of live testimony

[2] Record citations are as follows: 29.15 hearing transcript (H.Tr.); 29.15 legal file (L.F.); trial transcript (Tr.); and direct appeal legal file (D.L.F.).

of seventeen witnesses,[3] that focused on Carman's background and character (H.Tr.1-4). The record shows the following.

Pretrial Proceedings

Counsel entered her appearance on February, 1996, sixteen months before trial (H.Tr.85). During that time, she, her co-counsel and investigators contacted approximately ten witnesses to develop Carman's life history for mitigation (H.Tr.238). This contact varied from form letters, to telephone contact, to personal interviews (H.Tr.238).

The defense did not talk to Mary Banks, Carman's aunt (H.Tr.121,139). No one interviewed David Hood, one of Carman's mother's live-in boyfriends during Carman's childhood (H.Tr.96). Counsel neither interviewed nor deposed Tonia Cummings, Carman's sister and codefendant (H.Tr.98). Ms. Sullivan recalled talking to Carman's counsel before trial, but did not recall whether counsel asked to interview Tonia regarding mitigation (H.Tr.24). Ms. Sullivan would have discouraged Tonia from testifying at Carman's trial (H.Tr.27).

Counsel sent form letters to Elvina Deck, Carman's aunt, who raised his siblings for seven years, and Wilma Laird, Carman's paternal aunt (H.Tr.124-27). Counsel attempted phone contact, but no one attempted personally to visit these witnesses. *Id.*

[3] The original depositions were admitted, but not marked as exhibits. Thus, Carman will reference them by the witness' name.

After Carman's suicide attempt in the jail, counsel hired Dr. Rosalyn Schultz to evaluate him for competency (H.Tr.153-58). Yet, she provided Dr. Schultz with no background records or material nor had her consider any issues relating to mitigation (H.Tr.156-58).

The Trial

Voir Dire

When jury selection began, counsel was not quite sure what the defense witnesses were going to testify about at the penalty phase, so she did not voir dire about specific mitigating circumstances (H.Tr.183). Counsel questioned three[4] panels of venirepersons regarding their ability to impose a death or a life sentence (Tr.451-52,485,503). With two of the panels, counsel never mentioned the term mitigation (Tr.451-52,485). She referenced the term with the third panel (Tr.503). After trial, counsel changed how she did death qualification voir dire, recognizing that jurors did not understand what mitigation meant (H.Tr.184).

Guilt Phase

Carman's defense in the guilt phase was to suggest that his mother's boyfriend, Jim Boliek, had killed the victims (Tr.551-52). This defense was consistent with Carman's first statement to police, but not his final taped statement where he admitted doing the shooting. *Id*. The defense called two witnesses; one cast suspicion on the boyfriend (Tr.798-805).

[4] Appellant only discusses the three panels with venirepersons who actually served.

During the jury's deliberations, the court had counsel prepare the penalty phase instructions in chambers (H.Tr.161). Defense counsel had brought two mitigating instructions to court (Tr.1063). One submitted nonstatutory mitigators, so the court denied it. *Id.* The second was MAI-CR3d 313.44B, which was incorrect since it only applied to offenses occurring before August 28, 1993 (Tr.1063). The judge used the court's computer to draft a different mitigating instruction, but it too was inaccurate as it omitted the final two paragraphs that are required by MAI-CR3d 313.44A (Exs.71-72).

The jury returned guilty verdicts at 8:00 p.m. (Tr.835). Counsel then returned to her office to get her file, so that she could outline her penalty phase closing argument at home that evening (Tr.192-93).

Penalty Phase

The State introduced certified copies of Carman's prior convictions, for non-assaultive crimes, such as stealing a lawnmower, burglaries and aiding the escape of a prisoner (Tr.838-41). The State also called three victim impact witnesses (Tr.853-74).

Counsel called four witnesses in penalty phase: Rita Deck (Carman's stepmother), Beverly Dulinski (Carman's maternal aunt), Major Puckett (Carman's foster parent 8-9 months) and Michael Deck (Carman's younger brother) (Tr. 878-922).

Counsel had not spoken to Michael or Major Puckett prior to trial; her investigator and cocounsel had contacted them by phone (H.Tr.133-34,135,211). So counsel interviewed them during two lunch breaks during the trial (H.Tr.134,135-36,186,194-95). She wished she had had more time with Michael, but thought she got as much information as she could from Major Puckett (H.Tr.136).

Counsel had spoken with Rita and Beverly before trial (H.Tr.117-20,131-32). Beverly traveled from Oklahoma for the trial, but counsel could not meet with her before trial to prepare for her testimony, because counsel was busy preparing for jury selection (H.Tr.132). Counsel talked to Beverly during the breaks at trial (H.Tr.132). Counsel also spoke to Rita during breaks (H.Tr.131) and had her investigators work with her while the state was introducing its evidence in penalty phase (H.Tr.194-95).

Rita testified about an incident that occurred when Carman was ten (Tr.879-82). Carman's mother, Kathy, had left the children home alone with nothing to eat (Tr.881-82). Someone called Pete and told him to come get his children who were only (Tr.881-82) ten, six or seven, three and two. The children were hungry, dirty, and tired (Tr.882). Pete moved in with another woman in 1976; Pete and Rita reunited in 1988 and married (Tr.883-84). That is when she became close to Carman (Tr. 884). She thought he was good and kind and she still loved him (Tr.885).

Beverly revealed Kathy's background; Kathy and Beverly were abused and then separated when their father kidnapped Kathy (Tr.890-91).

Kathy had four children in seven years (Tr.888). She had not much money and did not dress the children well (Tr.889). They were dirty and lacked food to eat. *Id.* She often left them alone while she went to clubs (Tr.890). Carman took care of the others. *Id*. Kathy once asked Beverly to take the children, but she could not since she was pregnant with three children of her own (Tr.893). The children lived with Pete and Rita one year and then with Pete and Marietta (Tr.893-94). Marietta did not want them and was not good to them (Tr.894-96). Marietta put them in foster homes where they were

split up. *Id.* Carman went from one place to another and at times, was back with Kathy (Tr.896-97,904). She shoplifted in front of him (Tr.897).). She drank and provided him with nothing to eat (Tr.905). Beverly loved Carman very much (Tr.898). He was a sweet little boy who needed love and attention. *Id.* But, he was afraid to love, because if you do it is taken away (Tr.906).

Major Puckett was a foster parent for Carman when he was 13-14 years old (Tr.901,904). He stayed with the Pucketts eight or nine months (Tr.901). They had no trouble with Carman; he got along well with Major and Mrs. Puckett and the other children (Tr.904). Carman had a beautiful relationship with Mrs. Puckett, who was blind; he took care of her (Tr.905-06). DFS took Carman away, even though he and the Pucketts wanted him to stay (Tr.907). Major Puckett only saw Carman one other time - - one dark night he came by and told him that his mother had knocked him through a plate glass window (Tr.907). The Major drove 800 miles to testify for Carman (Tr.907-08).

Michael, Carman's younger brother, testified, identifying their parents and siblings (Tr.909-10). Michael recalled a marginal childhood (Tr.910). They never saw their parents, Carman took care of them (Tr.910-11). They were hungry all the time (Tr.911). It got so bad that one Thanksgiving their dad took them to his brother and wife's house - Uncle Norman and Aunt Elvina (Tr.912). Michael was so hungry that he ate a big plate of food, threw up in his plate, and tried to eat it again (Tr.912-3). They were all hungry (Tr.912).

They stayed there a short time and then lived with their stepmother, Marietta, and father, a truckdriver (Tr.913). Marietta did horrible things to the children (Tr.914). She

fed them hot dogs every day and limited them to one each. *Id.* Michael was hungry yet she would eat 1/2 his hot dog and walk away. *Id.* She punished them for no reason. *Id*. She made them kneel on a broomstick and left them there for hours. *Id.* If they tried to stand up, she "knocked the hell out of them." *Id.* She was harshest with the oldest children, and slapped their faces (Tr.915). She once refused to let Carman go to the bathroom. *Id.* He defecated in his pants and she rubbed it in his face and made him leave it on. *Id.* Finally, Marietta made Pete choose between the kids and her (Tr.916). They argued and then he took them back to Norman and Elvina's (Tr.916).

Michael did not see his dad or Carman for seven years (Tr.916). The three younger children stayed with their aunt and uncle, but they did not want Carman (Tr.916-17). Later, Michael and Carman were reunited and they got along well (Tr.919). Michael loved Carman and feels bad because he had a hard life and was neglected (Tr.920). Carman was afraid to love, because everybody had turned their backs on him. *Id*. Michael and his children would continue to have contact with Carman in prison. *Id.*

During his closing, the prosecutor argued:

> I want you to think about Carmen Deck pacing for ten minutes. Mr. Jerrell suggested that you count out ten minutes and you think about how long that is and *then think about somebody pointing a gun at your head at the same time*.

(Tr.948) (emphasis added). Counsel made no objection. *Id*. The prosecutor also argued:

> Carman Deck doesn't want justice, he wants a break. *These folks want justice. These folks deserve justice. These folks deserve justice (holds up*

exhibit) and you twelve individuals are the only people that are going to give it to them.

(Tr.946) (emphasis added). Again, counsel did not object. *Id.* The prosecutor asked for the jury to compare the victims -- upstanding, respected members of the community -- to Carman, "a petty thief, an inept burglar and multiple killer" (Tr.946, 947,948,949,950). Counsel did not object to this argument as improper appeal to emotion, to weigh the value of the victims and Carman's life or a call to impose the sentence desired by the victims' family (Tr.947-50).

The jury deliberated from 4:07 to 9:30 pm (Tr.951-52). During their deliberations, the jury asked the judge to define mitigation (D.L.F.262). When he refused and told them to give the term its ordinary meaning, the jury asked for a dictionary (D.L.F.262-63). The court refused and did not explain the term (D.L.F.263). At some point, a juror wrote a note that they were unable to reach a verdict (D.L.F.261), but eventually the jury returned a verdict of death (Tr.952;D.L.F.264-65).

Sentencing

On the afternoon of sentencing, counsel was preparing an expert witness, Dr. Richard Weiner, to testify about jury instructions (H.Tr.63-64,Tr.1063). Dr. Weiner asked counsel whether the MAIs had changed since he conducted his study. *Id.* He noted that the mitigating circumstances instruction submitted to Carman's jury lacked two paragraphs required by the MAI. *Id*. Counsel had not noticed the omission (H.Tr.163).

At sentencing, counsel asked for a new penalty phase because the mitigating circumstances instruction omitted the final paragraph that told the jury they need not be unanimous to consider mitigation (Tr.954-56). The prosecutor responded that it was offered by the defense (Tr.956). Counsel admitted that she had made a mistake (Tr.960). Counsel believed, based on their notes during deliberations that the jurors were confused about mitigation. They asked for a definition of deliberation and then asked for a dictionary (Tr.963-64). The court overruled the request, stating that counsel had submitted the faulty instruction; counsel had an obligation to submit in proper form, and she had failed to show prejudice (Tr.965,976).

Dr. Weiner testified that he had studied jurors' comprehension of the MAI penalty phase instructions and it was low (Tr.979-1061). The less the jurors understand the instructions, the more likely they are to give death (Tr.1036). The prosecutor objected to Dr. Weiner's testimony because these jurors he studied were not the actual jurors in this case (Tr.973,976). He complained that "none of the jurors in this case were questioned" (Tr.973). Counsel asked leave for Dr. Weiner to interview jurors, but the court denied the request (Tr.1061). The court sentenced Carman to death (Tr.1073-74).

Direct Appeal

Carman's appellate counsel raised eleven issues (Ex.70). Three issues were not preserved for review. *Id.* at 14-16, 22. Counsel testified that she researched an issue raised before trial and in the motion for new trial, the failure to disqualify the prosecutor's office (H.Tr.49-50). Counsel found no helpful case law. *Id.* The issue would have fit in well with her theme on appeal and if case law had supported the issue she would have

raised it (H.Tr.51-52,61). She had no strategic reason for eliminating it, but wanted to raise all meritorious issues (H.Tr.53).

29.15 Proceedings

Trial counsel thought that she and her staff had investigated and developed a fairly complete life history of Carman (H.Tr.88,93). However, counsel admitted that she did not know much of the information discovered during the 29.15 proceedings (H.Tr.93-109).

Carman was born on August 9, 1965 (Banks,7). He was the oldest of 4 children: Tonia, Latisha and Michael (Laird,12). His mother, Kathy Barker, (Laird,12) and his father, Pete Deck (Laird,12), never married, but were together for several years (Laird,12). Kathy met Pete at Chez Pare when she was 16 (Barker,24;P.Deck,21). He was working there as a floor bouncer. *Id.* They had sex and she got pregnant. *Id.* She was young and not prepared to be a mother. *Id.* at 26-28.

When Carman was only three weeks old, his parents left him with Pete's mother, Josie, while they went to a bar (Banks,8-9,12). Josie called her daughter-in-law, Mary Banks, worried; Carman was sick (Banks,9). When Mary arrived, she found Carman on the bed wearing only a diaper. *Id.* Josie had no air conditioning or fan. *Id.* Carman's stomach was large and he was breathing hard. *Id.* Josie said he had not had a bowel movement in two days and she had no milk to feed him. *Id*. He had not eaten all day and only had a bottle of powdered milk the previous day. *Id.*

Mary bought formula and syrup and gave Carman a bottle (Banks,10) which he took so fast that Mary had to pull it away so he could rest. *Id.* He guzzled an 8 oz. bottle.

Id. He then went to sleep and started breathing normally. *Id.* Mary took formula nightly, since Josie had no refrigeration (Banks,11). Carman's parents provided no food for the baby. *Id*.

When Carman was three months old, he became dehydrated, but survived (Barker,33-35). Pete and Kathy put beer in his baby bottle to get him to sleep (Barker,108). Later, Carman gave his children beer out of the bottle (M.Deck,43-44).

Pete was an alcoholic who was gone most of the time (M.Deck,28,42). He drank six or seven beers each day (R.Deck,18). They had bags and bags of beer cans (M.Deck,44). He drank at bars and got into fights (Barker,59-61). But, Pete did not believe he had a drinking problem (P.Deck,40).

Pete only had a third grade education (R.Deck,26). According to Kathy, he often was unemployed, sat around and drew welfare (Barker,29). He went from job to job and was not a good worker (Barker,39,62-63;M.Deck,44-45). However, Pete claimed he worked 80 hours a week, splitting his time between the farm and a feed company where he drove a truck (P.Deck,24-26;R.Deck,19).

He gave what money he made to Kathy, but she did not pay the bills (Laird,20;E.Deck,23;P.Deck,26). She made sure that she had nice clothes and jewelry, but spent no money on the children (Laird,21;Banks,30;E.Deck,23-24;R.Deck,20-21;P.Deck,26-27). Kathy explained that she tried to look as good and glamorous as she could and dress for success (Barker,43-44). She looked glamorous, but her children were dirty, hungry, and wore dirty clothes with holes (Banks,15-16,30; R.Deck,20).

When Pete was home, he and Kathy constantly argued, usually about the other men that she was seeing (Cummings,13,35-36). But, Pete was having affairs too (M.Deck,28). Pete never did anything with his children (M.Deck,45-46,48). They never had birthday parties when they were young (M.Deck,46-47). If they participated in any activities at school, they walked and their parents never came. *Id.* at 49.

Kathy was not a good mother (Laird,13,25,Banks,15;R.Deck,23) and she never bonded with Carman (B.Dulinski,43). She played with her children for a couple of hours and then left them when she got tired (Laird,15-16). She was irresponsible. *Id.* She left her children home alone with nothing to eat (Laird,13-14;E.Deck,15;B.Dulinski,28-30;M.Deck,25,34-35). They were dirty (Banks,15;B.Dulinski,30). They wore diapers until they fell off, with excrement dripping down their legs (B.Dulinski,23-24). The children were left to fend for themselves and ran wild, climbing on tables and the refrigerator (Banks,17). When Michael was only two or three, he pulled a cabinet down and it fell on him (E.Deck,15;M.Deck,35). They could be seen running barefoot and without coats in December (Banks,30). The house was filthy and stunk (M.Deck,34,39).

Carman tried to care for his younger brother and sisters (M.Deck,25). He left to find food (M.Deck,36-37). He would return and pass it out to others (M.Deck,37). Mike swallowed his whole, he was so hungry. *Id*. at 37-38. Carman tried to give him baths and change diapers. *Id*. at 39. When Mike was scared, Carman consoled him, hugged him and told him it would be okay. *Id.* at 39-40. Carman said he would go get mommy and make her come home. *Id.* at 40. They thought she was whoring around. *Id*. at 41. Sometimes he called Aunt Beverly and she came over with food. *Id*.

Sometimes Kathy left them with their Uncle Eugene who had epilepsy, was mentally retarded and had the mind of a six or seven year old child (Laird 8,13;Banks 29;E.Deck,13,37;P.Deck,35). He had suffered from seizures since he was thirteen and others had to make sure he did not choke on his tongue (Laird,8;P.Deck,35-36). Eugene was incapable of caring for himself, let alone watch anyone else (Laird 14;Banks,29;E.Deck,14,37). Nevertheless, Kathy left the young children with him practically every weekend (E.Deck,13-15).

When Kathy was with her children, she was abusive and was harsh with Carman (Laird,16-18;B.Dulinski,45; M.Deck,50-53). When Carman was only one or two, she hit him in the head with a shoe (Laird,16-18). When his aunt tried to intervene, Kathy told her to mind her own business (Laird,18). When Carman was only one and a half, Kathy spanked him and made him sit on the floor for two hours without moving (E.Deck,9).

Kathy was a singer and performed at bars and places like the Elks and Eagles (Hood 7,9-10,Laird,15,21-22,Banks,13;Barker,42). Having a good time and her music meant more to her than anything, including her children, who were pushed aside (P.Deck,23-24;M.Deck,25,26). Sometimes she took the children with her to bars and sometimes she left them with a sitter (Barker,44). They were there from 9:00 p.m. to 1:00 a.m. (Barker,51). She did not think they snuck off and did mischief, but it was possible. *Id*. If they were smoking, she did not know about it. *Id.* at 52. The children remembered being left alone, being unsupervised and smoking (M.Deck,26).

Kathy was wild and slept with a lot of different men (Hood,14-15,E.Deck 9-10;M.Deck,24). She had different men in and out of the house all the time (M.Deck,24).

Kathy said "$100.00 is $100.00" (E.Deck10). She would leave the house, revealing that she was going to have sex with a married man (E.Deck10-11). She prostituted herself many times (E.Deck 12-13). Pete caught her with another man once, but thought she was doing it all the time (P.Deck,22-23).

One of her boyfriends was her guitar player, David Hood (Hood,7,11;Barker,45-46). They were involved for three years, but actually lived together for one year (Hood,11-12). Hood met Kathy when Carman was seven or eight, but he never had much to do with him or his siblings (Hood,11-12).

When Carman was ten years old, Kathy left the children alone two or three days with nothing to eat (E.Deck,15). A neighbor called the sheriff, who went to Pete (E.Deck,15;P.Deck,33). The sheriff told Pete that if he wanted his children, to get them or he would put them in a home (E.Deck,15). They were dirty and hungry (E.Deck,16;P.Deck,38). Michael ate so fast that he threw up in his plate (E.Deck,16;P.Deck,34).

Michael and Tishia were both in diapers that had not been changed for more than a day. (R.Deck,12-13;P.Deck,33,38). Rita could not wait to get them in the tub. *Id.* Their bottoms were red and galled with severe diaper rash for which Rita got them medicine. *Id*.

They stayed with Norman and Elvina for awhile (E.Deck,32). During this time, Pete and Norman shot one of Carman's pet dogs while Carman watched (E.Deck,35-36;P.Deck,41). Although the dog had gone mad and they shot it to protect the children,

Carman was young and did not understand why they killed his pet. *Id*. They tried to explain it, but Elvina realized it was not handled well. *Id*.

With the children gone, Kathy could move in with Hood (Hood,13,19;Barker,46). Kathy told him that she took the children to the welfare office in St. Genevieve and left them on the steps (Hood,12). Later, she said Pete had them. *Id.* They did not discuss the children (Hood,19). She knew that he did not like or want them, so she did not try to get them back (Barker,47). Kathy said that she went to see them every Monday in St. Genevieve, but Hood did not know whether she really did (Hood,20). He heard that she was prostituting herself (Hood 15,18). One day, he caught her having sex with her uncle (Hood 15,17).

Kathy was crazy and violent; she tried to stab Hood and he became scared of her. (Hood 21-23). She bragged about having burned a place down (Hood,23). Hood finally left the band and broke up with her (Hood,21). She harassed him every day (Hood,22). She broke his door at home and interfered with his business, showing up in tight skirts (Hood,22).

Pete was involved with Rita, who was 18 years old (R.Deck,16). When she found out that she was three months pregnant, she told Pete and he left her (R.Deck,16; M.Deck,28-29). Rita cried and moved in with her parents (R.Deck,17). Rita's aunt and uncle called Pete and told him when their daughter was born, but he did not meet her for seven years. *Id.*

Pete met and married Marietta who was the stereotypical "evil stepmother"; she was mean to all the children (Banks at 16-19;E.Deck,20-21;Barker,66). She was an

alcoholic who spent all of Pete's money on alcohol (E.Deck,19;P.Deck,45-46). She screamed at the children and threatened to knock their heads off (Banks,16-17). She beat them with a clothes hanger (Barker,66-67). She did not feed them regularly and they were often hungry (Banks,17;E.Deck,21). She only gave them hot dogs (Banks at 17). She had them go into stores and steal cigarettes for her (E.Deck,19). She locked them outside during the summer when it was hot (E.Deck,21).

Nearly the entire family knew about the incident in which Marietta refused to allow Carman to use the bathroom and then smeared his feces over his face making him leave it on for one hour (Banks,18-19;E.Deck,21-22,38,39). Carman cried while Marietta held him down (E.Deck,22). Elvina took him to her house, gave him a bath, and told Marietta she was sick (E.Deck,22,39). Marietta cursed in front of Carman and said, "The little son of a bitch, if he wouldn't have shit his pants then we wouldn't have to do this." (E.Deck,22-23,39). Marietta took a picture of it and thought it was funny (Banks,18-19;E.Deck,21-22). She showed the photo to his other relatives (Banks,18-19). Carman felt angry, upset and insulted. *Id*. at 75. She was very cruel and wanted to totally denigrate him. *Id*. She hoped to control him and make him feel worthless. *Id.* at 76.

Marietta eventually suggested that they put the children in a foster home (P.Deck,43-44). The three younger children went to live with their Uncle Norman and his wife Elvina (E.Deck,16-17;P.Deck,29). They did not take Carman (E.Deck,17; P.Deck,29). Elvina thought he wanted to live with his mother (E.Deck,17,27-28), but others believed that Norman and Elvina did not want him (M. Deck,58-59). The three

were with their aunt and uncle for eight years (E.Deck,20). During that time, they did not see Carman; Kathy never brought him to visit (E.Deck,20).

Carman was sexually active very young, 10-12 years old (Cummings,71-78;M.Deck,29-30). He had sex with two cousins, Jane Deck (Norman's daughter) and Sherry Sanders (Beverly's daughter). *Id*. He also had sex with his sister, Tonia *Id*.

Carman moved from place to place, sometimes living with Kathy and sometimes staying at foster homes (Barker,48-49;M.Deck,58). When he was ten or twelve, he stayed with Art and Carol Miserocchi who lived on a 120 acre farm in Sedgewickville (A. Miserocchi at 6-7, C. Miserocchi at 6-8). Carman was only there six or seven months (A. Miserocchi,7-8). Carman was distant and did not play with the other children, who did not like him (A. Miserocchi at 9, 14, C. Miserocchi,11-12). The older kids played tricks on him. They took him to the woods where he was lost for two hours (A. Miserocchi,14). They knew Carman had problems. One child saw Carman try to have sex with a pig and a vacuum cleaner (A. Miserocchi,15, C. Miserocchi,16-17).

While at the Miserocchi's, Carman followed direction and did his chores, although sometimes they had to push him to get them done (A. Miserocchi at 9-10, C. Miserocchi,13). Carman did not like being there, away from his parents, brothers and sisters (A. Miserocchi,11; C. Miserocchi,15). None of his family visited him while he was there (A. Miserocchi,11; C. Miserocchi,13-14). Mr. Miserocchi tried to reach out to Carman, but he did not respond (A. Miserocchi,13; C. Miserocchi,16). Finally, when someone came in a pickup to get him, Carman jumped in and never looked back (A. Miserocchi,13-14; C. Miserocchi,16).

Once Carman was back with Kathy, his chaotic life resumed (E.Deck,19). She had many boyfriends who were abusive. (B.Dulinski,26-27,38-40). Ron Brewster was a hateful, dangerous alcoholic. *Id*. at 41. While Carman watched, he hit her with his fist and told her that she was a "no good slut". *Id.* 38-39. He threw her through a window, for which she was treated at the hospital. *Id*. at 40-41. Once, he told Kathy to fix him something to eat and then threw the plate at her. *Id*. at 41-42. They argued, he pulled a gun on her and threatened to blow her head off. *Id*. Beverly and Carman froze as they watched. *Id*. at 42. Carman fought with Ron and tried to protect his mother (Barker,93).

Often Kathy was gone and Carman was left alone (E.Deck,19). She let him run the streets of Festus at all hours of the night (P.Deck,38-39). By example, Kathy taught Carman how to steal (E.Deck,19;B.Dulinski;46-48). Kathy stole a ham and switched tags on items. *Id.* at 46-48. She returned the stolen items to the store for cash, saying she lost the tags. *Id.* at 48. However, when Carman began to steal, she called him a "little thief" and whipped him with a belt (Barker,71-73).

She often hit her children. She beat Carman with a cane and a broomstick when he was in his teens (M.Deck,51). She slapped the children's faces for back-talking (M.Deck,52). She often used her fists, which her big rings made painful (M.Deck,50,52). She pulled them to the floor by their hair (M.Deck,52).

In 1978, Carman's uncle, Dorman, was electrocuted in a grain bin (Banks,20;P.Deck,8-9). Carman cried like a baby when he saw him (Banks,20). Later, he visited the grave with Dorman's wife, Mary (Banks,20,36).

Carman continued bouncing from foster home to Kathy and back (Barker,81-87,90,97-98). He never had a steady home (Barker,97).

In 1980-81, when Carman was 13 or 14, he was placed with the Pucketts (Puckett,7). They had no problems with Carman and he thrived under the structured, disciplined atmosphere. *Id.* at 11,13-15,17-19. The children got up at 7:00 a.m. and had daily chores. *Id.* at 11. They made their beds, cleaned their rooms, and brought their clothes to the laundry. *Id*. They ate breakfast at 7:30 a.m, cleaned their dishes, and gathered their books to go to the bus-stop. *Id.* When they returned from school, they had to go to their room and put up their books. *Id.* If they had homework, they did that first. *Id*. Then they did chores, feeding rabbits, chickens, cows and horses, gathering eggs and carrying wood. *Id.* at 11,14.

Carman needed minimal supervision and could be trusted with anything. *Id.* at 14-15. He did not break the rules, with the exception of not making his bed on one occasion. *Id.* at 14,18. Mrs. Puckett made Carman write a paragraph from the Bible and then she questioned him about it. *Id*. Carman did fine in school: he made average grades and the Pucketts received no negative reports from his teachers. *Id.* at 16-17. He did his homework and he did not play hooky. *Id.*

The children had access to TV, board games, record players and a radio. *Id*. at 13. However, Major Puckett limited the type of music they could listen to. He was a minister and he did not allow certain music and dancing. *Id.* at 13-14. He disciplined the children by taking away privileges like television, play time and activities outside the home. *Id.* They also had to write chapters and books from the Bible. *Id.*

They ate at 6:00 p.m and after dinner they had a family conference at which they could say anything they wanted. *Id.* at 11. The children shared their secrets and it helped them cope. *Id*. at 22-23. They laughed and cried together. *Id.* Carman shared his past like the alcoholism in his home; that his mother was mean to him - pulling his hair, kicking him and hitting him with the heel of her shoe. *Id*. at 24-25. She had a temper and would go off the deep end. *Id*. He revealed that she lived with different men and, from one day to the next, he never knew who would be there. *Id.* at 24. Carman could not cope with her sexual practices. *Id.* She had sex on the couch in front of him when he was only 8 years old. *Id.* at 29-30.

Carman rarely talked about his siblings. *Id.* at 25. His father visited him once while Carman was at the Pucketts and would not come inside. *Id*. at 20. Carman went to the car and his father stayed 30 minutes. *Id*. His mother came once too, but stayed only 10 minutes. *Id.* Again, she stayed out in her car. *Id.* He had nothing good to say about his family. *Id*. at 25.

The Major saw that Carman's mother lived in filth and disarray. *Id.* at 33-34. His first impression was nobody could live here since it looked like a trash dump. *Id.*

Carman needed a mother so badly, which is why he was so close to Mrs. Puckett, who was blind. *Id.* at 15-17. He read recipes for her and helped her decipher the labels on groceries. *Id.* Carman talked to the Pucketts about his hopes and dreams. *Id*. at 12-13. They felt close to Carman, who was like their son. *Id.* at 29.

DFS came and told Carman that he had to return to his mother. *Id.* at 30-31. He cried because he did not want to return. *Id.* He said nothing had changed, she was still

living with men, still doing the same things. *Id.* He told them they were killing him. *Id*. They never gave a reason why he had to go back. *Id*. He was put back in the same situation from which he had been removed. *Id.*

Carman was very close to his paternal grandmother, Josie (Laird,23-24;E.Deck,30-31;P.Deck,16-17). Carman was her pride and joy - she loved him and was a good influence on him (E.Deck,31). Her death in 1983 devastated Carman (Laird,24; P.Deck,18-19).

Carman's family thought he was a nice boy (Laird,25-26;R.Dulinski,31,41). They loved him (E.Deck,43;B.Dulinski,9-12). He was smart, caring, open-hearted, kind and thoughtful to others (R.Dulinski,31,41,44). But, he did not go to his family with his emotional needs, keepup everything bundled up inside, because he was afraid to say anything (E.Deck,35).

Many family members wanted to help Carman, but couldn't. Mary Banks and her husband Dorman wanted to adopt Carman, but family services required more bedrooms than they had and Kathy would not agree or sign the necessary paper work (Banks,19-20). Kathy said, "I'm not giving up my damn kids" (Banks,20).

As Carman grew older, his problems continued. In 1985, he stole a lawnmower in St. Francois County and was placed on probation (Tr.842-43). In 1988, his probation was revoked. *Id*. Carman committed other non-assaultive crimes, such as stealing, burglary and aiding the escape of a prisoner (Tr.853-74). When he was 19 years old, incarcerated in Jefferson City, his mother got a call in the middle of the night (Cummings,85-86). They were taking him to the hospital. *Id.* at 85. Five inmates held him down and raped

him. *Id*. at 85-88; Ex.63 and H.Tr.222. Afterwards, he started taking antidepressants (Surratt,125,135-36;H.Tr.222).

When he was in his twenties, Carman met Stacey Tesreau (S.Tesreau,6). They dated a few months. *Id.* 7. Four years later, after Stacey's son was born, they reunited. *Id*. at 6-7,11. A year later, they got engaged. *Id*. at 6-7. Even though Carman was not Dylan's biological father, Carman became a father figure and Dylan called him "Daddy Pete." *Id.* at 12-13. Carman loved Dylan and bought him gifts. *Id*. at 16. Carman was nice to Dylan and did fun things with him (D.Tesreau,11-14).

While they were together, Stacey and Carman became very close (S.Tesreau,17,18,20). They both had been sexually molested as children and they shared their feelings. *Id*. Carman hated his mother and called her a tramp and a floozy. *Id*. at 14,16,20. They never knew where she was sleeping or with who she was having sex. *Id.* at 15. She would be living with one man and going out with another. *Id.*

In June, 1996, two or three weeks before the offense, Stacey and Carman broke their engagement and Carman started dating another woman. *Id.* at 25,27. He started gambling with Stacey's money. *Id.* at 31-32. He wrote bad checks. *Id.* at 41. However, she still allowed Dylan to visit him on the weekend. *Id* at 25, 32.

After his arrest, Carman called Stacey, crying his eyes out. *Id.* at 27. He was so sorry that he had destroyed their relationship. *Id.* at 37-38. He sent her 150 letters apologizing. *Id*. at 38. He sent birthday and Christmas cards to Dylan while he was jailed. *Id.* at 38.

Carman was close to his niece, Amber, Michael's daughter (M.Deck,7-9). He spent a lot of time with her, gave her presents, and went to her birthday parties. *Id.* 7-9,19-21. He played with her and put together her dollhouse. *Id.* at 20. She loved Carman. *Id*. at 9,20.

Dr. Eleatha Surratt, an expert in Child and Adult Psychiatry, reviewed Carman's background records, interviewed Carman, his mother, father, sisters - Tonia and Latisha - Elvina Deck, Rita Deck, Beverly Dulinski and Stacey Tesreau and reviewed the depositions of Michael Deck, Dylan Tesreau, Wilma Laird, Mary Banks, Art and Carol Miserocchi (Surratt, 6,17,18-19,26-27,41,60,93,94,98,102,104,107,111-12,112,113,115).

Carman did not grow up in an environment conducive to healthy psychological development. *Id.* at 141. Carman suffered from physical, sexual, and emotional abuse and neglect that was extreme in frequency, extent and intensity. *Id.* at 40-41. Given his despicable childhood, Carman could not learn to trust anyone. *Id.* at 142.

The System failed Carman. *Id.* at 149-50. During his early years, no attempts were made to rescue him and later attempts were inconsistent. *Id.* at 149. He was bounced back and forth, from stable environments back to abusive situations. *Id.* at 150.

Major Puckett believed he was crying for help. *Id.* at 33-34. But"the court did not help him. . .Family Services did not help him. His parents did not help." *Id*. at 38.

The motion court found that 29.15 counsel had presented significant information about Carman's life history, but denied the claim of ineffectiveness (L.F.340-44). This appeal follows.

POINTS RELIED ON

I. Counsel Did Not Investigate and Present Mitigation

The motion court clearly erred in denying the claim of counsel's ineffectiveness for failing to investigate and to present the circumstances of Carman's life history through witnesses, David Hood, Mary Banks, Dylan Tesreau, Elvina Deck, Stacey Tesreau, Art and Carol Miserocchi, Richard Dulinski, Wilma Laird, Kathy Barker, Pete Deck, Tonia Cummings, Major Puckett, Michael Deck, Rita Deck, and Beverly Dulinsky and Exhibits 1-53, photos of Carman and his family; and to call a qualified expert, such as Dr. Surratt, to explain the significance of this evidence because Carman was denied his right to effective assistance of counsel (U.S. Const., Amends. 6 and 14), in that counsel failed to talk to many witnesses, and waited until trial to briefly speak to others, thus, she could not make reasonable, informed decisions about who to call and what evidence to present, and the motion court applied the wrong standard for finding prejudice, that the outcome of the trial would have been different, rather than a reasonable probability sufficient to undermine confidence in the outcome. Applying the appropriate standard, Carman was prejudiced as the jury never heard about how Carman's mother beat and hit him during his infancy through his teens, how his mother's boyfriends abused him, how Carman and his siblings were sexually abused when they were young children, how Carman was left without food when he was an infant causing him to be sick and dehydrated, and the many details of his horrible childhood, filled with extreme physical, sexual and emotional abuse, and neglect and

how that impacted him. Had the jury heard this evidence there is a reasonable probability that they would have sentenced Carman to life, rather than death.

*Williams v. Taylor,*120 S.Ct.1495 (2000);

Collier v. Turpin, 177 F.3d 1184 (11thCir.1999);

Wallace v. Stewart, 184 F.3d 1112 (9thCir.1999)

State v. Johnson, 968 S.W.2d 686 (Mo.banc1998); and

U.S. Const., Amends. VI and XIV.

II. Counsel Did Not Voir Dire Jurors on Mitigation

The motion court clearly erred in denying Carman's claim regarding counsel's failure to adequately voir dire jurors on mitigation because the inadequate voir dire denied him his rights to due process, a fair trial, effective assistance of counsel and to be free from cruel and unusual punishment (U.S. Const., Amends. 5,6,8,14) in that counsel failed to explain mitigation and question jurors about whether they could consider mitigating circumstances and Carman was prejudiced as three jurors cried during the victims' son's testimony, showing a real probability that their sentence of death was based on emotion, not the evidence and the law; the jurors' notes revealed that they did not understand what mitigation meant; and the jurors did not receive accurate instructions on mitigation, explaining that they *shall* consider mitigation and need not be unanimous.

State v. Clark, 981 S.W.2d 143 (Mo.banc1998)

Morgan v. Illinois, 504 U.S. 719 (1992);

Presley v. State, 750 S.W.2d 602 (Mo.App.S.D.1988);

State v. McKee, 826 S.W.2d 26 (Mo.App.W.D.1992);

U.S. Const., Amends. V, VI, VIII, and XIV.

III. Counsel Submitted Faulty Instruction on Mitigation

The motion court clearly erred in denying the claim of counsel's ineffectiveness for submitting a mitigation instruction that is contrary to MAI-CR3d 313.44(a), omitting two paragraphs telling jurors they shall consider mitigation and need not be unanimous, because Carman's rights to effective assistance of counsel (U.S. Const., Amends. 6 and 14), in that counsel acknowledged that she made a mistake and that the two paragraphs were critical to her defense. The motion court applied the wrong standard for reviewing the claim for prejudice -- whether Carman could show a manifest injustice, not the *Strickland* standard -- whether a reasonable probability exits that the outcome would have been different. Carman has shown such a probability since the jurors were confused about mitigation, deliberated more than five hours, and the directive to consider mitigation and explicit instruction that they need not be unanimous could have resulted in a life sentence.

Gray v. Lynn, 6 F.3d 265 (5thCir.1993);

United States v. Span, 75 F.3d 1383 (9thCir.1996);

State v. Keenan, 779 S.W.2d 743 (Mo.App.S.D.1989);

Salkil v. State, 736 S.W.2d 428 (Mo.App.W.D.1987);

U.S. Const., Amends. VI and XIV.

IV. What Is Mitigation ?

The motion court clearly erred in overruling Carman's 29.15 motion because the trial court's failure to instruct the jury on what mitigation meant in response to their questions, and trial counsel's failure to request such an instruction, denied him effective assistance of counsel, due process, a fair trial and freedom from cruel and unusual punishment (U.S. Const., Amends. 5, 6, 8, 14) in that: once the jury made explicit its difficulty in understanding mitigation, the trial court had a duty to clear away its confusion with concrete accuracy. A death sentence should not rest on an equivocal direction to the jury on such a basic issue as what constitutes mitigation; and a jury must be allowed to consider mitigation, something impossible if they do not understand what it is. Their confusion creates the risk that the death sentence was improperly imposed and counsel unreasonably failed to request -- on the record -- a proper instruction and did not provide the court with substantive law showing that the court must define mitigation. Carman was prejudiced since, had the jurors been properly instructed on what mitigation meant, a reasonable probability exists that, they would have sentenced him to life.

Bollenbach v. United States, 326 U.S. 607(1946);

Weeks v. Angelone, 120 S.Ct. 727 (2000);

Lockett v. Ohio, 438 U.S. 586 (1978);

State v. Carson, 941 S.W.2d 518 (Mo.banc1997);

U.S. Const., Amends. V, VI, VIII, and XIV.

V. Postconviction Counsel Was Not Allowed to Talk to Jurors

The motion court abused its discretion in denying Carman's request to interview jurors pursuant to local court Rule 53.3 because the absolute prohibition denied him a fair and impartial jury, due process and freedom from cruel and unusual punishment (U.S. Const., Amends. 6,8,14), in that questioning jurors was necessary to prove the constitutional claims of juror misconduct, ineffective assistance of counsel, and the invalidity of Carman's death sentence. Under Local Rule 53.3, Carman had shown good cause for the interviews, based on the jury's notes during their deliberations. To interpret Rule 53.3 to allow a blanket prohibition against any post-trial interviews renders the rule unconstitutional.

Williams v. Taylor, 120 S.Ct. 1479 (2000);

State v. Jones, 979 S.W.2d 171(Mo.banc 1998);

State v. Babb, 680 S.W.2d 150, 152 (Mo.banc1984);

Lytle v. State, 762 S.W.2d 830 (Mo.App.W.D.1988);

U.S. Const., Amends. VI, VIII, and XIV;

Rule 27.26; and

Rule 53.3.

VI. Prosecutor's Inflammatory Argument

The motion court clearly erred in denying Carman's claims that trial counsel was ineffective for failing to object to the prosecutor's improper argument and that the argument violated Carman's right to due process, a fair trial, and freedom from cruel and unusual punishment (U.S. Const., Amends. 5,6,8,14) in that the prosecutor's suggestions that jurors think about someone pointing a gun to their head for ten minutes was improper personalization; that they give the victims' family justice allowed the victims' family to recommend a death sentence; and that the victims were more worthwhile than Carman was improper since it encouraged the jury to weigh the value of lives. Carman was prejudiced by the improper argument as it injected emotion and caprice into the jury's determination of punishment.

State v. Storey, 901 S.W.2d 886 (Mo.banc1995);

State v. Rhodes, 988 S.W.2d 521 (Mo.banc1999);

State v. Taylor, 944 S.W.2d 925 (Mo.banc1997);

Copeland v. Washington, 232 F.3d 969 (8thCir.2000); and

U.S. Const., Amends. V, VI, VIII, and XIV.

VII. Appellate Counsel Was Ineffective

The motion court clearly erred in denying the Rule 29.15 motion because Carman was denied effective assistance of counsel (U.S. Const., Amends. 6 and 14), in that appellate counsel failed to raise the trial court's error in overruling the defense motion to disqualify the prosecuting attorney's office due to a conflict of interest caused by an assistant prosecutor's prior representation of Carman since: the claim had significant merit; the law supported the claim; the claim was preserved for review; and appellate counsel pursued weaker issues, including three claims based on the plain error standard of review, claims alleging an abuse of discretion in failing to declare mistrial, and a "reasonable doubt instruction" challenge that has been repeatedly rejected. The motion court clearly erred in ruling Carman must show actual prejudice, since an appearance of impropriety merits reversal.

State v. Sumlin, 820 S.W.2d 487 (Mo.banc1991);

Evitts v. Lucey, 469 U.S. 387 (1985);

State v. Ross, 829 S.W.2d 948 (Mo.banc1992);

State v. Reinschmidt, 984 S.W.2d 189 (Mo.App.S.D.1998);

U.S. Const., Amends. VI and XIV;

Rule 29.15.

VIII. Rule 29.15 Time Limits and the AEDPA

The motion court clearly erred in ruling that 29.15 is constitutional, because the unreasonably short time limits violate the Due Process Clause of the 14th Amendment in that the 90-day time limit is very short, petitioner must proceed *pro se*, the Rule has no justifiable excuse provision, and state habeas provides no viable alternative to Rule 29.15 as it is limited to rare and exceptional circumstances resulting in a manifest injustice. Thus, the Rule does not provide a reasonable opportunity to present issues involving federal constitutional rights and is especially unfair given the limited and deferential review in federal court under AEDPA.

Williams v. Taylor, 120 S.Ct. 1495 (2000);

Hoffman v. Arave, 236 F.3d 523 (9thCir.2001);

People v. Germany, 674 P.2d 345 (Colo.1983)

Day v. State, 770 S.W.2d 692 (Mo.banc1989);

U.S. Const., Amend. V, VI, VIII, and XIV;

Rule 29.15.

ARGUMENTS

I. Counsel Did Not Investigate and Present Mitigation

The motion court clearly erred in denying the claim of counsel's ineffectiveness for failing to investigate and to present the circumstances of Carman's life history through witnesses, David Hood, Mary Banks, Dylan Tesreau, Elvina Deck, Stacey Tesreau, Art and Carol Miserocchi, Richard Dulinski, Wilma Laird, Kathy Barker, Pete Deck, Tonia Cummings, Major Puckett, Michael Deck, Rita Deck, and Beverly Dulinsky and Exhibits 1-53, photos of Carman and his family; and to call a qualified expert, such as Dr. Surratt, to explain the significance of this evidence because Carman was denied his right to effective assistance of counsel (U.S. Const., Amends. 6 and 14), in that counsel failed to talk to many witnesses, and waited until trial to briefly speak to others, thus, she could not make reasonable, informed decisions about who to call and what evidence to present, and the motion court applied the wrong standard for finding prejudice, that the outcome of the trial would have been different, rather than a reasonable probability sufficient to undermine confidence in the outcome. Applying the appropriate standard, Carman was prejudiced as the jury never heard about how Carman's mother beat and hit him during his infancy through his teens, how his mother's boyfriends abused him, how Carman and his siblings were sexually abused when they were young children, how Carman was left without food when he was an infant causing him to be sick and dehydrated, and the many details of his horrible childhood, filled with extreme physical, sexual and emotional abuse, and neglect and

how that impacted him. Had the jury heard this evidence there is a reasonable probability that they would have sentenced Carman to life, rather than death.

The motion court considered the testimony of sixteen witnesses, family photos, and an expert regarding Carman's background and how it impacted him. The court recognized that the evidence was significant but concluded that counsel was not ineffective, crediting her reasons for not calling witnesses and finding that Carman had failed to show that the outcome would have been different (L.F.340-44). These findings do not withstand scrutiny.

Counsel was ineffective. She failed to conduct an adequate investigation. She and her staff talked to only about ten witnesses. Many of those were brief interviews. Some were last minute, occurring during the trial itself. Without an adequate investigation, counsel could not make reasonable, strategic decisions about what evidence to present.

Carman was prejudiced. The court applied the wrong standard for evaluating prejudice: the outcome *would have been different*. Had the court applied the correct standard, *a reasonable probability that the outcome would have been different, sufficient to undermine confidence in the outcome,* it would have found prejudice. Had the jury heard the significant evidence of Carman's horrendous childhood and its impact on him, it likely would have imposed a life sentence.

This Court must review the motion court's findings for clear error. *Sanders v. State,* 738 S.W.2d 856, 857 (Mo. banc 1987). To establish ineffective assistance of counsel, Carman must show that his counsel's performance was deficient and that such performance prejudiced him. *Strickland v. Washington*, 466 U.S. 668 (1984); and

Williams v. Taylor,120 S.Ct.1495,1511-12 (2000). To prove prejudice, he must show a "reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *State v. Butler*, 951 S.W.2d 600,608 (Mo.banc1997); *Williams v. Taylor*, *supra*.

In *Williams*, counsel was ineffective for failing to investigate and present substantial mitigating evidence of Williams' nightmarish childhood. *Id*. at 1514. Evidence of Williams' borderline mental retardation and that he did not advance beyond the sixth grade were mitigating factors the jury never heard, as were prison records showing good behavior in prison, prison officials' testimony that Williams was not likely to be violent in the future, and testimony that Williams seemed to thrive in a regimented, structured environment. *Id.* In finding counsel ineffective, the Supreme Court held that trial counsel has an "obligation to conduct a *thorough* investigation of the defendant's background." *Id.* at 1515 (emphasis added).

Here, too, counsel failed miserably. The jury never heard the horrific details of how Carman was neglected as an infant. He had no formula for days and became dehydrated. When he did get a bottle, his parents often put alcohol in it to sedate him. The jury never heard about his mother abused him throughout his life - from infancy through his teens. While a toddler, she beat him, threw a shoe, and hit him in the head. The jury never heard that his mother had sex in front of him and that he was molested at a young age by those entrusted to care for him. The jury never saw the family photos that showed Carman and others (Ex.1-53). The jury did not know these things because counsel failed to investigate and prepare for trial.

A. Carman's Life History Showing Abuse, Neglect and Suffering

Witnesses not Interviewed or Called to Testify

The motion court recognized that counsel failed to investigate. She never even contacted numerous witnesses, including David L. Hood, Mary Banks, and Dylan Tesreau (L.F.341).

David Hood, one of Kathy's many live-in boyfriends, provided a first-hand account of how violent and crazy Kathy was when Carman was little (*Hood*). He revealed that Kathy had sex with many men, including her uncle. *Id.* at 14-15,17-19. And, most significantly, he described how she abandoned her children, leaving them on the steps at the welfare office. *Id.* at 12. She treated her children like trash, something to be tossed aside when she tired of them or had something "better" to occupy her like music or sex with a boyfriend. Hood's information was important and significant. Since the jury did not hear it from any other source, the court's conclusion that he "had little to offer regarding movant's life history" (L.F.341) is incorrect.

Both the motion court and trial counsel acknowledged that Mary Banks had significant information about Carman's infancy (L.F.341). Banks recalled that Carman's parents left him for days, without adequate formula, when he was only three weeks old, so that they could go to a bar (Banks,8-9,12). He had one bottle in two days and was hungry and sick. *Id*. Banks had to buy formula and take it to him daily, since his Grandma Josie lacked refrigeration. *Id.* at 10-11. Carman's parents provided no food for him. *Id*.

While recognizing the significance of this information, the court seemed to excuse counsel's failure to interview Banks, saying counsel was not made aware of her (L.F.341). But Banks was married to Dorman Eugene Deck, Pete Deck's brother (Banks,6). Counsel said she did a complete life history, through which she was aware of *all* Carman's relatives, including his aunts (H.Tr.88-93). She wanted to talk to anybody who knew Carman (H.Tr.92). She had no reason for not contacting Mary and did not know why she failed to interview her (H.Tr.139). Counsel simply missed this witness who had compelling information about the neglect and physical abuse Carman suffered as an infant and a young child (Banks, 6-32).

The motion court also excused counsel's failure in interview Dylan Tesreau, the young boy Carman treated like his son at the time of the offense. Counsel admitted that she never even talked to Dylan or his mother (H.Tr.215;S.Tesreau,25-27). She had no idea how Carman treated Dylan or what their relationship was like, so she could not decide whether she wanted to present evidence of the relationship, through Dylan or other witnesses who saw them interact. It simply never occurred to her (H.Tr.215). Nonetheless, the motion court credited counsel's after-the-fact justification for failing to interview Dylan, that she would never have called a 4 1/2 under any circumstance (L.F.341).

Abandoning a defense without adequate investigation cannot be condoned as a reasonable strategic decision. *DeLuca v. Lord*, 77 F.3d 578, 586-87 (2d Cir. 1996). "[T]he mere incantation of the word 'strategy' does not insulate attorney behavior from review. The attorney's choice of tactics must be reasonable under the circumstances."

Cave v. Singletary, 971 F.2d 1513,1518(11thCir.1992). Without first investigating Dylan and Carman's relationship, counsel could not make a strategic decision about whether to call him or present evidence about their relationship through others.

The motion court found that counsel tried to contact Elvina Deck and that information Elvina provided was available through other sources (L.F.341). Counsel's attempts to contact Elvina were a form letter (H.Tr.124-27) and a short phone call, 5 to 15 minutes long (E.Deck,28,40-41). Counsel knew where she lived, but never even tried to see her when she was in St. Genevieve (H.Tr.139-40). She never sent an investigator to interview her. *Id*. She told Elvina that she would get back to her, but never did (E.Deck,41). Even counsel admitted that Elvina was important - she raised Mike, Tonia and Tishia for eight years, but did not take Carman (H.Tr.139-40).

The court's conclusion that information provided by Elvina was available through other sources if flat wrong. Elvina knew that Kathy left the children with their Uncle Eugene, who had epilepsy and was mentally retarded (E.Deck,13,37;). He had the mind of a six or seven-year-old (E.Deck,37). Eugene was incapable of caring for himself, let alone watch anyone else (E.Deck,14,37). Nevertheless, Kathy left her young children with him practically every weekend (E.Deck,13-15).

Contrary to the court's finding, the only other witnesses who knew about Eugene were Laird and Banks, witnesses counsel failed to interview, and Pete, who was not questioned about this matter (Laird 8,13,14;Banks 29; P.Deck,35-36). Counsel admitted that she did not know about Eugene's seizures or the extent of his disability (H.Tr.228-29).

Elvina also knew that when Carman was only one and a half, Kathy spanked him and made him sit on the floor for two hours without moving (E.Deck,9). No one else testified about this, at either the 29.15 proceedings or trial. Counsel presented no evidence about how Kathy abused her children. Perhaps she could have learned about this through other witnesses, but she did not. Since she only spent five or ten minutes with Michael in the lobby before he testified, she had hardly enough time to learn about Carman's upbringing, let alone detailed accounts of abuse (M.Deck,15).

Elvina knew that Kathy was prostituting herself when the children were little (E.Deck 12-13). Elvina was the only witness who established that Kathy admitted what she was doing, saying that "$100.00 is $100.00" (E.Deck10). Again, although others (David Hood, Michael and Pete Deck (Hood,14-15;M.Deck,24; P.Deck,22-23)) knew about the prostitution, counsel did not know about it because she did not talk to the witnesses or contacted them so briefly that she did not discover it.

Elvina also knew about a traumatic event - that Carman's pet dog was shot in front of him (E.Deck,35-36). The motion court found that counsel knew about this information, she admitted that she did not (H.Tr.99-100).

The only significant information that Elvina provided at the 29.15 proceeding that the jury heard was the Thanksgiving incident - in which the children were left alone for days without food, and the feces incident - in which Marietta smeared feces on Carman's face (E.Deck,15-16,20-23,39). However, counsel admitted that she did not know who had witnessed the feces incident or who had seen the picture Marietta had taken (H.Tr.102-03). She certainly was unaware that Elvina took Carman to her house and

bathed him (E.Deck,22,39). Counsel did not know that Elvina told Marietta she was sick or that Marietta cursed in front of Carman. *Id.* at 22-23,39.

The motion court also forgave counsel's failure to contact Stacey Tesreau, Carman's fiancée. Though they had lived together for nearly a year, counsel never even contacted her (S.Tesreau,25,27,29). Stacey was surprised, because they had been engaged until only two or three weeks before Carman's arrest. *Id.* at 25. Counsel tried to justify her failure to interview this important witness, saying she received a phone call from a man who identified himself as a friend of Stacey's (H.Tr. 216-17). He said that she should tell Carman to quit calling Stacey at work, because she was feeling harassed. *Id*. Counsel did not verify whether Stacey was being harassed or whether she would to talk to counsel. *Id.*

Had counsel taken even a few moments to contact Stacey, she would have realized that she cared very much about Carman and would have cooperated completely. She was willing to testify, and also would have allowed her son, Dylan, to testify (S.Tesreau,27). Stacey was crucial to any investigation of Carman's background, since he had confided in her about the sexual abuse he suffered. *Id*. at 17,18,20. Counsel suspected that Carman had been sexually molested, but never confirmed her suspicions through investigation (H.Tr.96,97,151,222). She never knew that a babysitter, Peggy, had molested Carman when he was little (H.Tr.228).

The motion court found that negative information - that Carman stole Stacey's money and gambled it away - was something counsel was not willing to risk (L.F.341). The court ignores that counsel knew nothing about this when she decided not to

interview, let alone call, Stacey. Counsel learned this nugget under her own cross-examination at the 29.15 hearing (H.Tr.217), hardly timely for factoring it into her decision regarding what witnesses to call at trial.

Counsel's failure to interview her client's fiancée is unforgivable. She had important information. And, even if counsel had chosen not to use her as a witness, she nonetheless confirmed the sexual abuse Carman suffered. Counsel could have followed up on this information, with both Carman and others, and could have to provide the information to an expert in childhood development.

The motion court found counsel's decision not to call Art and Carol Miserocchi, Carman's foster parents, was reasonable (L.F.341). Carol had little recollection of Carman. *Id*. Counsel decided not to use Art, because of Carman's sexual behavior with a pig. *Id.* The court ignores that counsel never even spoke to Art when she made the decision not to call him (A.Miserocchi,16-17).

The Miserocchis were important. Carman had lived with them when he was 10 to12 (A.Miserocchi,6-7;C.Miserocchi,6-8). He had just been abandoned by his parents and separated from his siblings, for whom he had cared his entire life. Carman missed his parents and siblings, and none of his family visited him while he was there (A.Miserocchi,11;C.Miserocchi,13-15). Not surprisingly, he was distant and did not play with the other children (A.Miserocchi,9;C.Miserocchi,11-12).

Carman's behavior while there was a red flag indicating a history of sexual abuse. Normal unabused ten year olds do not try to have sex with a pig or a vacuum cleaner (A.Miserocchi,15; C.Miserocchi,16-17). Counsel's decision that she did not want the

jury to hear about this reveals her total lack of understanding of the devastating effects sexual abuse.

Since counsel never spoke to Mr. Miserocchi, she never knew that Carman followed direction and did his chores (A.Miserocchi,9-10). She never knew that Mr. Miserocchi thought Carman was cute and full of spunk. *Id.* at 13. She had no idea that Mr. Miserocchi tried to reach out to Carman, but he did not respond. *Id*. And, since counsel never knew, more importantly, the jury never knew.

The motion court found that counsel's failure to call Richard Dulinski in penalty phase was reasonable, since he had known for Carman only a couple of years before the offense and had "virtually no information to offer that was not already know[n] to Movant's trial counsel." (L.F.341-42).

The court is correct - Dulinski knew Carman for only a couple of years, more than twice as long as Major Puckett, a witness who counsel called. Thus, the length of their relationship does not accurately measure the witness' value. The court ignores that, although counsel interviewed and called Richard regarding guilt phase issues, she failed to question him about Carman and their relationship. Had counsel adequately investigated, she would have discovered that Richard cared deeply about Carman. Richard found Carman smart, caring, open-hearted, kind and thoughtful to others (R.Dulinski,31,41,44). He appreciated how good Carman was to his wife, Beverly. *Id.* at 12. This information may have meant nothing to counsel, but it was important for the jury to understand that Carman's life had value to many people. After all he had been through, he was still kind and caring.

The motion court spent little time addressing the importance of Wilma Laird, Carman's paternal aunt, since counsel's staff contacted her twice and she refused to give them any information (L.F.342). The court overlooked that Laird was willing to cooperate with trial counsel (Laird,28). She received two phone calls, out of the blue, from people asserting they were connected with the defense; yet no one offered to give her a phone number so that she could verify who the person was. *Id*. at 26-27,29. No one tried to talk to her personally. *Id.* at 28-29. Counsel admitted they attempted no personal contact (H.Tr.143).

Laird had important information. She knew that Kathy was a bad mother (Laird,13) She left her children when she tired of them, and when was with them, she was abusive. *Id.* at 16-18. Laird saw Kathy hit Carman in the head with a shoe when he was only one or two. *Id.* at 15-18. When Laird tried to intervene, Kathy told her to mind her own business and she would "whup [sic] him anytime she felt like it." *Id.* at 18. The jury heard not a single witness describe such abuse.

The motion court found counsel's decision not to call Carman's mother, Kathy, reasonable (L.F.342). She believed that Kathy would try to minimize her own blame for Carman's poor upbringing and would try to help Tonia at Carman's expense. *Id.* While Kathy's deposition testimony shows an attempt to minimize her actions, it also reveals much mitigation that the jury should have heard.

Kathy provided information about Pete that was unavailable from other witnesses. In contrast to the picture of a hard worker his relatives painted, Kathy remembered Pete as unemployed, drawing welfare (Barker,29). He went from job to job, and was a bad

worker. *Id.* at 39, 62-63. He drank at bars and got into fights. *Id.* at 59-61. He put beer in Carman's baby bottle to make him sleep, something counsel never knew. *Id.* at 108; (H.Tr.99).

Kathy's testimony also illustrated just how selfish and irresponsible she was. While her children were dirty, with holes in their clothes, Kathy dressed for success and tried to look as glamorous as possible. *Id.* at 43-44. She thought nothing of taking the children (age 2-10) with her to bars until 1:00 a.m. *Id*. at 44, 51. She rationalized that everyone kept an eye on them. *Id.* However, even she had to admit that they may have snuck off and gotten into mischief. *Id.* She had no idea that they were smoking. *Id*. at 52. Neither did trial counsel (H.Tr.213-15).

Kathy made no connection between her behavior and its effects on her children. She admitted stealing in front of the children, but, when Carman began to steal, she called him a "little thief" and whipped him with a belt. *Id*. at 71-73.

Kathy was a critical witness for the jury to hear in penalty phase. She was an abusive, neglectful mother who put her desires before her children's needs. She took no responsibility for her actions and their effects on her children. Precisely because she minimized her own blameworthiness and tried to blame others, the jury should have heard her.

The motion court approved of counsel "tactical" decision not to call Carman's father, Pete (L.F.342). He was uncommunicative and uncooperative, and did not even come to the trial until subpoenaed. *Id.* But, as with Kathy, counsel's decision was unreasonable.

First, it was not based on a full investigation. Counsel only talked to him twice, for a total of an hour (P.Deck,49-50,62,68). In that hour, she spent 10-15 minutes asking about Kathy, 10-15 minutes asking about Marietta, 15 minutes about him, and the remaining time chit-chatting about the weather and his yard. *Id.* at 64. Counsel was "pushed for time" and left after the brief interview. *Id.* at 67.

Given the little time counsel spent with Pete, it was not surprising that she knew little of the information that he provided at the 29.15 proceeding. Counsel never discovered that he put beer in the babies' bottles (H.Tr.99). She never knew that he shot Carman's pet while Carman watched (H.Tr.99-100;P.Deck,41). Counsel did not know the severity of Eugene's seizures and mental retardation (H.Tr.228-29;P.Deck,35-36).

Dr. Surratt called Pete a passive abuser (Surratt,38-39,104). Regardless of the label, he repeatedly allowed his children to be neglected. He put them in one abusive situation after another, and accepted no responsibility for their care. He described these abusive and neglectful situations as though he had no role in creating them.

He thought that Kathy was irresponsible in leaving the children with Eugene (P.Deck,35-36) but did nothing to stop it. He knew that Kathy was sleeping with other men in front of the children, but did nothing to protect them. *Id.* at 22-23. Pete commented that music and having a good time meant more to her than her children, but he did not intervene on their behalf. *Id.* 23-24. Kathy often left her children alone, with nothing to eat. *Id.* at 33. Pete allowed this to happen, year after year. It did not stop until a sheriff called him and told him to get them. *Id.* Pete married Marietta who beat, humiliated, and starved them. When confronted with her abuse, he did not reject her.

Rather, he chose her and discarded his children (P.Deck,29,43-44). Days, months, years passed without Pete seeing his children.

Pete was uncommunicative and detached with counsel. This was exactly how he behaved as a father. The jury should have heard that he allowed his children to be abused, neglected, and abandoned.

The motion court approved of counsel's failure to interview or depose Tonia Cummings, Carman's sister, since she was a codefendant and her counsel would have advised her against testifying in his case (L.F.342-43). Counsel called her a "basket case." *Id.* The court's finding ignores that, Cummings was available for an interview and to testify, she simply was never asked (Cummings,134-37,183). Counsel did not even consider interviewing this witness, since she thought she was "unable" to speak to her (H.Tr.98). As a result, counsel knew none of the information that Cummings provided at the 29.15 proceedings (H.Tr.93). Carman was prejudiced since Cummings had important information that, at least, could have led to other witnesses.

Tonia's first memory was of her mom and dad arguing, constantly and heatedly when she was three years old (Cummings,13,35). Her mom told her father that she did not want them anymore; they fought over other men; he called her a "whore," she called him a "son of a bitch," and she hit him, with her hands and objects. *Id.* at 35-36.

The arguments would have been more frequent, had Pete been home, but he was a truck driver who spent most of his time away. *Id*. at 33. He was an alcoholic who drank every day, sometimes as much as a case. *Id.* at 99-100. He gave Carman beer to drink. *Id*. at 100. When at home, he never paid attention to the children and never showed up

for important events. *Id.* at 101-02. Finally, he tired of all of Kathy's cheating and left. *Id*. at 103.

The children were left with Kathy, who was wild. *Id.* at 21. She had many different men in the house and they had sex in front of the children. *Id*. at 32-33, 36-37. She took the children to bars, where they saw her kissing different men and having sex in the parking lot bars. *Id.* at 21-24.

Kathy's boyfriends and husbands were abusive to her and the children. *Id.* at 54-61. Ron Wurst was so violent that Tonia and Carman had to call 911. *Id.* at 55-58. Carman tried to intervene and protect his mother. *Id.* Husband, Ron Brewster, was violent, and cursed, and sexually molested Tishia, their younger sister. *Id.* at 58-61. When Tonia told Kathy, she chose Ron over Tishia. *Id*.

Kathy also abused the children, beating them with a cane, throwing things at them and knocking them to the floor. *Id.* at 40-42. She called them names. *Id.* She was harder on Carman than the others, because he often tried to protect his brothers and sisters and took the blame for things that they did. *Id.* at 42-43.

Kathy left the children alone and without food. *Id.* at 25-26, 28-29, 31-32, 44-45, 50-51. Tonia remembered that the best meal they ever had was a hamburger and chips. *Id*. at 28. Carman tried to find food for them to eat. *Id.* at 31-32. Mike almost was hit by a car as he followed Carman across the street and Carman brought him back home. *Id.* The children were dirty and wore hand-me-downs. *Id.* at 28, 44. DFS was often called. *Id*. at 29.

Sometimes the children were left with their Uncle Eugene who not only was unable to take care of them, but sexually molested Tonia. *Id*. at 48-49. Others sexually abused the children as well. *Id*. at 79-80, 108-09. Not surprisingly, the children became sexually active very young. *Id.* at 71-78. Carman first had sex with Tonia when she was five and when he was young he had sex with his cousins. *Id.* When they were older, he continued to try to have inappropriate sexual contact. *Id.* at 81, 82-83, 93-94.

Kathy finally took the children to foster care. *Id.* at 67. They begged her not to leave. *Id.* Years went by without a visit from her. *Id.* at 16.

Their time with their father and his wife was no better. Marietta drank heavily, up to a case of beer each day. *Id.* at 105-06. She physically and mentally abused the children. *Id*. She put dish soap in their mouths, did not feed them and left them outside all day in the hot sun. *Id*. She made them eat hot dogs, while she had steak, shrimp, baked potatoes and salad. *Id*. at 115-16. Carman tried to sneak food for them to eat in the middle of the night, but she caught and beat him. *Id*. at 116-17.

Marietta's son, Michael Johnson, raped Tonia, as Carman banged on the door trying to get in to protect his sister. *Id.* Carman was scared to be around Johnson. *Id*. at 110.

Marietta beat the children with belts and switches. *Id.* at 113-14. She slapped, scratched and threw things at them. *Id.* She pulled their hair and called them names. *Id.* at 119-20. She cut their hair to punish them. *Id.* When they tried to get help from their father, he took Marietta's side. *Id.*

One day, Pete dumped the children off at his brother, Norman's, saying he would come back in a few days. *Id*. at 103. He came back five or six years later. *Id*. Uncle Norman did not like Carman, he hit him with the butt of a gun. *Id.* at 125.

Tonia recalled other injuries Carman suffered, including a head injury from a diving accident, a bike wreck and a car accident. *Id.* at 94-96. Carman had started smoking and drinking when he was 9, and started using marijuana and cocaine when he was 12 or 13. *Id.* at 42,69-70.

Despite all his problems, Carman still cared about others and had some good relationships. He protected Latishia, when others made fun of her because she was mentally retarded. *Id*. at 98. He was good to Tonia's children, spending time with them and buying them gifts. *Id*. at 17-20.

Counsel admitted she never knew much of the information that Tonia provided, including the physical abuse Carman suffered (H.Tr.98-99,228-29). She had suspected sexual abuse, but never confirmed it (H.Tr.151). Without thoroughly investigating, counsel could not make reasonable decisions about what evidence to present. The jury never heard or saw Exs.1-53 - family photos. All of the compelling mitigation was readily available, had counsel simply asked.

Witnesses Called To Testify At Penalty Phase

Counsel called four witnesses in penalty phase. However, they did not testify about much of the information they provided in the 29.15 proceedings. Counsel had 16 months to prepare; postconviction counsel had three. Yet postconviction counsel was able to discover and present substantial more information. The motion court concluded

that, since counsel presented *some* evidence of Carman's horrible and tumultuous childhood background, she was not ineffective. (L.F.343). This conclusion is clearly erroneous.

Counsel did not make reasoned decisions about what information to elicit from these witnesses. Rather, she failed to conduct a thorough investigation and had no idea that much of the available information these four witnesses had even existed.

Major Puckett was first contacted by phone three months before trial (Puckett,36,44). During a ten-minute phone conversation, he briefly outlined some of the things he knew. *Id*. at 44. He was told that they would cover it thoroughly when he got to Missouri to testify. *Id*. Counsel spent only 10 or 15 minutes with the Major before he testified. *Id*. at 36. This was inadequate for him to relate his feelings regarding Carman or his treatment. *Id*. at 37. He was not prepared to testify completely and was instructed to give yes or no answers, to keep it short and to the point. *Id*. at 40.

Counsel's inadequate preparation caused the jury never to hear much of the mitigating evidence the Major had to offer. They heard nothing about the chores the children had to do, the structured daily routine, the games the children played, or the discipline the Pucketts provided (Puckett, 10-13, 18-19). The jury never heard about Carman's progress in school, *Id.* at 16-17, or how he thrived in that structured and disciplined environment. *Id.* at 14-15. They knew nothing of how the Pucketts listened to his hopes and dreams, *Id.* at 12-13, probably the first time anyone had ever listened to him.

This was in stark contrast to the environment his parents provided. Major Puckett had seen Carman's home and it was so filthy and in such disarray - a trash dump - that he thought nobody could live here. *Id*.33-34. This was where Carman's mother pulled him by the hair, kicked him and hit him with the heel of her shoe. *Id*. at 24. This was where she had brought so many different men, that Carman never knew who would show up from one night to the next. *Id.* This was where, when he was eight, she had sex on the filthy couch in front of him. *Id.*29-30. Yet, Major Puckett could not tell the jury any of these things, because counsel had spent insufficient time with him to know about them.

Michael Deck also felt counsel spent inadequate time with him. He was first contacted in May, 1997, while he was in Okinawa, Japan (M.Deck,13-14). It was a nice 30-minute phone call from co-counsel, Curtis Cox; they briefly discussed Carman's upbringing, and Michael said he would help in any way he could. *Id*. His second contact came in November, when he was told the trial date, but was not questioned. *Id.* at 16. The next contact came in February, 1998, in the hallway, before trial. *Id*. 15,78. Counsel spent 5-10 minutes with him, and asked 4-5 questions. *Id.* 15-17.

As with Major Puckett, her inadequate investigation and preparation of Michael caused the jury to not hear significant mitigation. Michael recalled that his dad was never around when they were growing up and never did any activities with them (M.Deck,28-29, 45-46). When he was there, he was drinking beer. *Id.* at 42-43,48. He gave beer to Carman when he was little and commented on what a good beer drinker he would be some day. *Id*. Pete was always too tired to be bothered with the children; all he wanted to do was drink. *Id.* at 48.

In contrast, Kathy was wild and had different men at the house all the time. *Id.* at 24-25, 28. She was irresponsible, and let the children run wild. Michael smoked cigarettes when he was only three. *Id.* at 26-27. She left them alone without food, and Carman tried to provide for them, even though he was a child himself. *Id*. at 36-41. She was violent and beat Carman. Id. at 50-53.

The jury never heard about Carman's relationship with Michael's daughter, Amber, whom Carman adored, spending a lot of time with her and buying her gifts. *Id*. at 7-9, 19-22. He was at Michael's house every day and was an important part of her life. *Id*.

Counsel spent more time with Rita Deck, interviewing her for one to two hours before trial, but still did not thoroughly investigate (R.Deck,25,27-28). Counsel never asked her about Kathy or Marietta. *Id.* at 25. They never discussed her testimony. *Id.*29-30. When she came to court, counsel just told her what she planned to ask. *Id*. at 30. Her testimony focused on the Thanksgiving incident in which the children were hungry and she mentioned how close she was to Carman since 1988 and would continue her contact with him (Tr.881-85).

The jury never heard her talk about Pete. Rita watched as he drank 6-7 beers daily (R.Deck,18-19). He abandoned his children and left Rita when she was 18 years old - three months pregnant with his child. *Id*. at 16-17. He did not see his daughter for seven years. *Id.* Like other witnesses, she could have testified about Kathy's treatment of Carman and his siblings, but was never asked. *Id*. at 12-13, 20-24.

Counsel called Beverly Dulinski, Kathy's sister, but did not thoroughly question her and missed several key areas. Beverly knew that Kathy took the children to bars and left them alone several times (B.Dulinski,25-29). Kathy had many boyfriends who were abusive to her and the children. *Id.* at 26-27, 38-42. David slammed her against a car door and almost cut off her ear. *Id*. at 27-28. Ron hit her with his fist and called her a "no-good slut" in front of Carman, he pushed her arm through a window, he threw a plate of food at her, and he pulled a gun and threatened to blow her head off, while Carman stood frozen from fright. *Id.* at 38-42.

Counsel admitted that she knew nothing about this violence (H.Tr.109-10) but rationalized that she would not have used the evidence unless she could "tie" it to the children (H.Tr.227). Carman watched as these men beat and yelled at his mother. He tried to protect her by fighting them or calling 911. The events clearly affected him. Yet, the jury heard nothing about the violent atmosphere in which Carman was raised.

Carman's case is similar to *Collier v. Turpin*, 177 F.3d 1184 (11thCir.1999), where counsel called ten penalty phase witnesses in a session that went late at night and the entire penalty phase lasted only 1 1/2 hours. *Id.* at 1201. As here, Collier's counsel said he wanted to present a strong case in mitigation. *Id.* at 1200. Yet, his desire stood in stark contrast to his presentation. *Id.* His examination of the witnesses was minimal. *Id.* at 1201. He sought to elicit little relevant evidence about Collier's character. *Id.* The court found counsel ineffective. "Counsel presented no more than a hollow shell of the testimony necessary for a 'particularized consideration of relevant aspects of the character and record of [a] convicted defendant before the imposition upon him of a

sentence of death.'" *Id*. at 1201-02 (quoting *Woodson v. North Carolina*, 428 U.S. 280, 303 (1976).

Here, too, counsel presented a hollow shell of the testimony necessary for the jury to understand Carman's character and upbringing. But, unlike *Collier*, here, counsel did not call ten witnesses. She called only four. As in *Collier*, she spent little time with each witness. She put on some evidence of his horrible and tumultuous childhood, but missed many significant areas, such as Kathy's physical abuse of her children, the physical abuse and verbal abuse by the boyfriends, sexual abuse of Carman and the hideous neglect he suffered as an infant.

Carman was prejudiced. The jury was struggling with what mitigation encompasses. They deliberated for more than five hours. Surely, had they heard the details of Carman's background, the horrendous abuse he suffered, the neglect he sustained, practically from birth, a reasonable probability exists that they would have sentenced him to life imprisonment, not death.

B. Expert in Penalty Phase

Counsel said she considered hiring an expert for the penalty phase, but she thought an expert witness would not play well in the semi-rural area of Jefferson County (H.Tr.240). The truth is - counsel decided not to hire an expert without first conducting an adequate investigation to see if one was necessary. She had not spoken to numerous witnesses. She did not know about the sexual and physical abuse Carman suffered. She knew nothing about the severe neglect he sustained as an infant.

Nevertheless, the motion court concluded that counsel was not ineffective because counsel's opinion that, an expert "would not play well," was a tactical decision it would not label ineffective (L.F.344). The court also noted counsel's concern about negative information, such as Carman's sexual behavior with a pig, his incestuous relationship with his sister and female cousins at an early age, and his sexual victimization by other inmates while in prison. *Id.* Since counsel was concerned about this "negative mitigation," the court concluded she was not ineffective. *Id.* These conclusions are clearly erroneous.

Counsel made these so-called "tactical decisions" without an adequate investigation. *See DeLuca v. Lord*, *supra* at 586-87; *Cave v. Singletary, supra* at1518. Further, neither counsel nor the motion court explained why semi-rural jurors would not relate well to an expert on child development. The Supreme Court recognized the value of a psychiatrist in penalty phase. *Ake v. Oklahoma*, 470 U.S. 68, 80 (1985). "Psychiatrists gather facts, through professional examination, interviews, and elsewhere." *Id*. They analyze the information and draw plausible conclusions about the defendant's mental condition and the effects of the disorder on behavior. *Id.* Through investigation, interpretation, and testimony, psychiatrists assist lay jurors to make a sensible, educated determination about the defendant's mental condition. *Id.* at 80-81. Contrary to counsel's assertion, lay jurors in Jefferson County, like those in Oklahoma, need this assistance.

This Court has found counsel ineffective in failing to present expert testimony of a psychiatrist in penalty phase. *See e.g.*, *State v. Johnson*, 968 S.W.2d 686, 697

(Mo.banc1998) (Counsel failed adequately to communicate with a psychiatrist who found that Johnson was suffering from cocaine intoxication delirium). This Court would not countenance insufficient pretrial preparation with an expert witness who had helpful opinions for the penalty phase. *Id*.

Similarly, in *Wallace v. Stewart*, 184 F.3d 1112, 1117 (9thCir.1999), counsel was held ineffective in failing to prepare and communicate with an expert in penalty phase. In *Wallace*, remarkably little time was devoted to exploring Wallace's mental state or other mitigating factors. *Id*. Had counsel looked, they would have discovered a great deal about Wallace's family history, including a psychotic, alcoholic and anorexic mother. *Id.* at 1116. The family history was important, because psychosis and alcoholism are passed genetically from parents to children. *Id*. Wallace had a chaotic home life; started sniffing glue and gasoline between the ages of ten and twelve and had suffered head trauma. *Id.* This was important, because children raised in profoundly dysfunctional environments like the Wallace household are prone to develop severe psychiatric disturbances. *Id.* Counsel presented the testimony of a psychiatrist, but gave him no information about Wallace's background or family history. *Id.* at 1115.

The Court found counsel ineffective for providing his expert with minimal information about the defendant. *Id*., relying on *Hendricks v. Calderon*, 70 F.3d. 1032(9th Cir. 1995) (counsel's failure to investigate and to present client's drug problems and hard childhood was deficient performance).

Here, counsel never even *hired* an expert for penalty phase, let alone provide them with any background material. Had counsel hired an expert, such as Dr. Surratt, the jury

would have been provided compelling information about Carman's psychological development.

Carman did not grow up in an environment conducive to healthy psychological development but suffered from physical, sexual, and emotional abuse and neglect (Surratt,140-41). The abuse was extreme in frequency, extent and intensity. *Id.* at 40. Since Carman's basic needs were never met, he could not trust or develop healthy relationships. *Id.* at 142.

Dr. Surratt found that Kathy was unable to parent, bond with her children and meet their needs. *Id.* at 25,115-16. Indeed, she did not meet even their most basic needs - feeding, clothing, and bathing, let alone their emotional needs. *Id.* at 58-59,93,96,98,103. She was either absent or abusive. *Id.*

Kathy's many strange men in the house put the children at risk for abuse. *Id.* at 46-47,67,96,98. She was sexually active in front of them. *Id.* at 48,67-68. When he was seven to ten, a babysitter and his third grade teacher sexually abused him. *Id.* at 68-69. Since Carman had been exposed to and involved in inappropriate sexualized behavior, he developed no rules or boundaries. *Id.* at 81-82. The abuse explained why he would try to have sex with a pig and a vacuum cleaner at age 10 and his incestuous relationships with his sister and cousins.

Carman's father was nearly as harmful to Carman as his mother. Pete was strikingly depressed with low energy. *Id.* at 27. He never acknowledged his problem with alcohol, although others recognized it. *Id.* at 27,51. He left his children in the care of abusive alcoholics. *Id.* at 36-37. His role was one of a "helpless father" or a "passive

abuser," who did not protect his children. *Id.* at 38-39, 104. Pete allowed horrible things to happen to his children and did not intervene. *Id.* at 39-40. A Sheriff had to call him and tell him to get his starving children; his relatives had to express outrage at the picture of Carman with feces on his face. *Id.* at 33,36,40.

Dr. Surratt could have explained that the feces incident was so traumatic for Carman because it was the ultimate emotionally abusive act. *Id.* at 73-74. Marietta was cruel and wanted to totally denigrate Carman. *Id*. She hoped to control him and make him feel worthless. *Id.* at 76. She succeeded - Carman was angry, upset, and insulted. *Id*. at 75.

Carman grew up feeling helpless. *Id.* at 40. He was trapped between a mother who left him without food, supervision and emotional support and a father who provided no help. *Id.* Carman learned to cope by separating himself from the other children: he was the caretaker. *Id.* at 61,65-66,84-85,92. He put himself outside the picture, minimizing and distancing himself from the abuse. *Id.* at 85-91,151-53,155. This explained why he shut down when counsel tried to talk to him about the abuse (H.Tr.151,221-22). Counsel needed an expert to explain information that she should have gotten from others.

Had a qualified psychiatrist, such as Dr. Surratt been called, Carman's jurors could have made a rational, educated determination about Carman, his childhood and how those traumatic events impacted him. They could have understood that Carman was unable to trust and form relationships. They could have decided that because of his abusive childhood, he should not be sentenced to death. But counsel failed to present this expert

testimony. Her decision not to hire an expert was made without a reasonable investigation. She was ineffective and Carman was prejudiced as a result. A new penalty phase should be granted.

II. Counsel Did Not Voir Dire Jurors on Mitigation

The motion court clearly erred in denying Carman's claim regarding counsel's failure to adequately voir dire jurors on mitigation because the inadequate voir dire denied him his rights to due process, a fair trial, effective assistance of counsel and to be free from cruel and unusual punishment (U.S. Const., Amends. 5,6,8,14) in that counsel failed to explain mitigation and question jurors about whether they could consider mitigating circumstances and Carman was prejudiced as three jurors cried during the victims' son's testimony, showing a real probability that their sentence of death was based on emotion, not the evidence and the law; the jurors' notes revealed that they did not understand what mitigation meant; and the jurors did not receive accurate instructions on mitigation, explaining that they *shall* consider mitigation and need not be unanimous.

The jurors did not understand mitigation. A review of counsel's voir dire explains why. She never mentioned the term "mitigation" with two of three panels, nor thoroughly investigated whether jurors could consider mitigation. As a result, Carman was denied his constitutional rights to effective assistance of counsel, due process, an impartial jury and freedom from cruel and unusual punishment.

Since counsel was preparing for jury selection on the very eve of trial, she could not meet with her penalty phase witnesses before trial (H.Tr.132). During jury selection, counsel failed to question veniremembers about whether they could consider specific mitigating evidence because she was unsure what her penalty phase witnesses were going

to say (H.Tr. 183). So, she questioned three[5] panels regarding the penalty phase as follows:

First Panel

> We're just talking about the proper sentence, life in prison without probation or parole versus death. Now, if you come to this point in trial, where you have to make this kind of decision, the Judge told you what actually happens is almost a second trial. You will still be the jury. We will all still be the lawyers. Carmen will still be here with us, but you hear all kinds of new evidence to help you in the decision. You'll hear evidence from Mr. Wilkins and Mr. Jerrell that I anticipate would be some of Mr. and Mrs. Long's children or grandchildren and you'd hear evidence about how the death of Mr. and Mrs. Long has affected them. It might be very emotional evidence and you might hear evidence -- well, I anticipate if you ever get to that point you would hear evidence that Carmen Deck has some criminal convictions, not for any violent crimes, and his prior criminal convictions would then be made known to you and what happened to him. You'd hear that kind of evidence and then maybe you'd hear some evidence from Carmen's family and you'll hear evidence about Carmen. You'd hear evidence about their lives with Carmen. These are all kinds of evidence that you would be asked to listen to and to consider before rendering a verdict. Everybody clear on this?

[5] Appellant only discusses those panels with venirepersons that actually served.

(Tr. 451-52).

Second Panel

If you come to a verdict of murder in the first degree, then essentially the second trial kicks in. Same lawyers, same judge same courtroom, same jury, but you hear new kinds of evidence, evidence that is -- evidence that the State will give you and ask you to consider reasons to sentence Carmen to death and evidence that will come from us that we would ask you to consider as reason to give Carmen a verdict of life.

I guess what I want to know is, is anybody going to exclude any kind of evidence whatsoever and go for a sentence of death, or on the other hand, say, nothing's gonna make me vote for death, it's only life? Nobody is saying that?

(Tr. 485).

Third Panel

The next step in the process is that you can consider what's called mitigating circumstances. That's not a list. An instruction that says anything you've heard in the courtroom can be reason for you to come back with a verdict of life imprisonment without parole or probation. There's no list. Anything you hear, any feeling you have, anything that causes you to say life is appropriate in this situation, even if you found the existence of aggravating circumstances, you could still consider anything else that you've heard in the courtroom or anything else that you like feel and come

> back with a verdict of life and you don't have to write that down and you don't have to be unanimous about it.

(Tr. 503).

Counsel later recognized that her voir dire was inadequate. She knew that she needed to explain mitigation in words lay people understand -- such as a reason to sentence someone to life (H.Tr. 183, 184). She knew that Carman's jurors had not understood mitigation (H.Tr. 184). As a result, she changed how she conducts voir dire, and developed a display for a demonstrative aid (H.Tr. 184).

The motion court denied the claim regarding counsel's inadequate voir dire (L.F. 351-2). It found counsel's change in how she voir dires on this issue showed that she had tried to become more effective in her techniques. *Id.* It then summarily concluded:

> Having reviewed the transcript of the death qualification phase of the voir dire, [Tr. 437-534] this Court finds that Movant's Trial Counsel was not ineffective in addressing those issues during jury selection. This Court cannot conclude that the result of the trial would have been different.

(L.F. 353). These findings and conclusions are clearly erroneous.

This Court must review the motion court's findings for clear error. *Sanders v. State,* 738 S.W.2d 856, 857 (Mo. banc 1987). To establish ineffective assistance of counsel, Carman must show that his counsel's performance was deficient. *Strickland v. Washington,* 466 U.S. 668 (1984); and *Williams v. Taylor,*120 S.Ct.1495,1511-12(2000). To prove prejudice, Carman must show a "reasonable probability that, but for counsel's

errors, the result of the proceeding would have been different." *State v. Butler*, 951 S.W.2d 600,608 (Mo.banc1997); *Williams v. Taylor*, *supra*.

Counsel can be ineffective in jury selection. *Presley v. State*, 750 S.W.2d 602,608 (Mo.App.S.D.1988) (counsel ineffective for failing to challenge for cause a juror who said he would be partial to the State because of his experience as a victim of a crime); *State v. McKee*, 826 S.W.2d 26, 28-29 (Mo.App.W.D.1992) (counsel ineffective for failing to challenge for cause jurors who admitted they would hold it against the defendant if he did not testify). *See also Winn v. State*, 871 S.W.2d 756, 763 (Tx.App.1993) (counsel ineffective for conducting inadequate voir dire, asking most venirepersons only a few questions and asking most, "any reason you could not be fair?" The cursory questioning resulted from a lack of preparation).

Carman was entitled to a fair and impartial jury. *State v. Clark*, 981 S.W.2d 143,146 (Mo.banc1998). U.S.Const. Amend. VI, XIV. One aspect of "the guarantee of a defendant's right to an impartial jury is an adequate voir dire to identify unqualified jurors." *Id.* (quoting). *Morgan v. Illinois*, 504 U.S. 719,729 (1992). The purpose of voir dire is to select a fair and impartial jury by discovering bias or prejudice. *Clark*, *supra* (citations omitted). "Without an adequate voir dire the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled." *Id*. (quoting) *Morgan*, 504 U.S. at 729-730. The failure to accord an accused a fair trial violates even the minimal standards of due process. *Irvin v. Dowd*, 366 U.S. 717 (1961).

Applying these fundamental principles, counsel had a duty *thoroughly* to investigate potentially biased views of venirepersons. *State v. Clark*, *supra* at 147. A defendant's Sixth Amendment right to an impartial jury is meaningless without the opportunity to prove bias. *Id*. (citing *Dennis v. United States*, 339 U.S. 162,171-72 (1950). Since the trial court allowed the attorneys to voir dire potential jurors, the onus was on counsel to prove bias through an adequate voir dire. *Clark*, *supra.*

Counsel failed miserably. She failed to investigate whether jurors could consider mitigation, a critical and necessary inquiry under *Morgan v. Illinois*, *supra.* She never even mentioned the term "mitigation" with two panels, from which ten jurors were selected. With Panel I, she did nothing to distinguish aggravating from mitigating evidence (Tr. 451-452). She simply told jurors they would be asked to listen and consider "all kinds of evidence" (Tr. 452). She never investigated whether any of the jurors even understood mitigation, a necessary predicate to determining whether they could consider it -- a question she never asked. She never explained that jurors had to be unanimous in finding an aggravator, and could consider mitigation even if any single juror found it existed.

With Panel II, counsel again never attempted to ask jurors whether they understood the concept of mitigation and could consider it (Tr. 485). Rather, her only question was whether jurors would "exclude any kind of evidence whatsoever" . . . and "go for a sentence of death" . . . or "say, nothing's gonna make me vote for death." *Id.*

With Panel III, from which two jurors were selected, counsel finally briefly explained mitigation (Tr. 503). However, even this "examination" was more of a lecture

than questioning to discover bias. Counsel never questioned jurors about their understanding of mitigation and their ability to consider it.

In *Clark*, *supra* at 144, this Court reversed a first degree murder conviction and death sentence due to inadequate voir dire. There, the trial court prohibited any voir dire regarding the age of the three-year-old victim. *Id*. at 145. This Court found a real probability of injury since the prosecutor emphasized the victim's age in opening and closing and one juror left the room crying after viewing the autopsy photos. *Id.* at 147-48. "Even one partial juror constitutes a real probability of injury." *Id.* at 148 (citing *Morgan*, 504 U.S. at 729,734 n.8).

Here, three jurors cried when the victims' son read a letter paying tribute to his parents and recounted the pain and suffering Carman caused (Tr.866-67,875-76). In closing, the prosecutor emphasized how valuable the victims were and how much their loss would be felt, especially when compared to Carman (Tr.946-50). The jurors had no clue what mitigation meant - they first asked for a definition, and then for a dictionary (D.L.F.262-63).

Counsel knew that the case would turn not on guilt or innocence, but whether Carman should be sentenced to death. Counsel had no good reason for not adequately voir-diring on mitigation. She simply was unprepared (Tr. 183-84). Carman was prejudiced as there is a real probability of injury -- that one partial juror sat on his jury and there is a reasonable probability that, had the jurors understood mitigation, they would have imposed a life sentence. The motion court clearly erred in ruling otherwise. This Court should reverse and remand for a new penalty phase.

III. Counsel Submitted Faulty Instruction on Mitigation

The motion court clearly erred in denying the claim of counsel's ineffectiveness for submitting a mitigation instruction that is contrary to MAI-CR3d 313.44(A), omitting two paragraphs telling jurors they shall consider mitigation and need not be unanimous, because Carman's rights to effective assistance of counsel (U.S. Const., Amends. 6 and 14), in that counsel acknowledged that she made a mistake and that the two paragraphs were critical to her defense. The motion court applied the wrong standard for reviewing the claim for prejudice -- whether Carman could show a manifest injustice, not the *Strickland* standard -- whether a reasonable probability exits that the outcome would have been different. Carman has shown such a probability since the jurors were confused about mitigation, deliberated more than five hours, and the directive to consider mitigation and explicit instruction that they need not be unanimous could have resulted in a life sentence.

Counsel brought the wrong MAI on mitigating circumstances to court. She hastily prepared a different instruction the night before penalty phase, leaving out two paragraphs. The submitted instruction failed to advise the jurors that they must consider mitigation and they need not be unanimous. Counsel acknowledged her mistake, both at sentencing and at the 29.15 hearing. Nonetheless, the motion court denied this claim stating Carman had not shown a manifest injustice on direct appeal. The motion court clearly erred, applying the wrong standard for proving prejudice. Counsel was ineffective and a new penalty phase should result.

Counsel submitted instructions on mitigation that eliminated two paragraphs: one, telling jurors they "shall" consider any facts and circumstances that they find mitigation; the other, explicitly telling them they need not be unanimous to consider mitigation (H.Tr.161-66,Exs.71,72). Counsel admitted she was unreasonable not to realize that the instructions were incomplete and not to submit the complete instructions (H.Tr.166). She had brought the wrong instruction to court -- MAI-CR3d 313.44(B), which applies to homicides committed *before* August 28, 1993 (Tr.955). Someone recognized the error, and the judge prepared Instructions 8 and 13 in chambers while the jury was deliberating on guilt (H.Tr.161). Counsel reviewed the instructions, but did not catch her mistake (H.Tr.161). At sentencing, the State argued that, since defense counsel submitted the wrong instruction, Carman was not entitled to relief (Tr.956,959).

Counsel realized the gravity of her mistake. The jurors were obviously confused about mitigation -- as evidenced by their notes during deliberations (H.Tr.164-65). They never received the final language of MAI-CR3d 313.44(A), that told them they must consider mitigation and need not be unanimous. Counsel recognized that this language was *critical* to her defense in this death penalty case (H.Tr.166).

Not surprisingly, the motion court found trial counsel made a mistake and had acknowledged it (L.F. 344-45). However, the court found no prejudice, citing this Court's review of the instructional error on direct appeal. *State v. Deck*, 994 S.W.2d 527,539-41 (Mo.banc1999) (L.F. 345). The motion court held that since no manifest injustice occurred, Carman had failed to establish prejudice. *Id.*

This Court must review the motion court's findings for clear error. *Sanders v. State,* 738 S.W.2d 856, 857 (Mo.banc1987). This finding is clearly erroneous, since the motion court applied the wrong standard for prejudice under *Strickland.*

To establish ineffective assistance of counsel, Carman must show that his counsel's performance was deficient and that such performance prejudiced him. *Strickland v. Washington,* 466 U.S. 668 (1984); and *Williams v. Taylor,*120 S.Ct.1495,1511-12 (2000). To prove prejudice, he must show a "reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *State v. Butler,* 951 S.W.2d 600,608 (Mo.banc1997); *Williams v. Taylor, supra.*

As this Court's opinion on direct appeal ruled, to establish a manifest injustice under the plain error standard, the court must have "so misdirected or failed to instruct the jury so that it is apparent that the instruction affected the verdict." *Deck*, *supra* at 540. Carman could not meet this standard, especially when all of the instructions were considered together. *Id.* at 540-41.

However, one can prove constitutionally ineffective assistance, showing prejudice, even if the underlying error was not plain error, resulting in a manifest injustice. *State v. Storey*, 901 S.W.2d 886,901 (Mo.banc1995) (court found prosecuting attorney's improper closing argument was not plain error, but found counsel ineffective for failing to object to improper argument). Similarly, in *United States v. Span,* 75 F.3d 1383,1389 (9thCir.1996), the Court found counsel was ineffective in failing to request proper self-defense instructions, even though the appellate court had not found plain error on direct appeal. Accordingly, the motion court erred in ruling that, since this Court found no

manifest injustice in the submission of Instructions 8 and 13, no prejudice could exist under *Strickland.*

Missouri courts consider ineffectiveness claims for failing to object to faulty instructions or proffer appropriate instructions like any other ineffective assistance claim, under *Strickland.* *See e.g.*, *State v. Keenan*, 779 S.W.2d 743,747 (Mo.App.S.D.1989) (recognizing that counsel could be ineffective for failing to request a lesser-included offense instruction on second degree assault); *Salkil v. State*, 736 S.W.2d 428,430 (Mo.App.W.D.1987) (counsel ineffective for failing to object at trial to ambiguous jury verdict form that combined findings of guilt and not guilty); and *Carter v. State*, 988 S.W.2d 600,601 (Mo.App.E.D.1999) (allegation regarding ineffective assistance relating to failure to object to improper self-defense instruction and failure to offer a modified self-defense instruction required evidentiary hearing).

Federal courts also review such claims under the *Strickland* standard. In *Gray v. Lynn*, 6 F.3d 265,268 (5thCir.1993), counsel was found ineffective for failing to object to a verdict director for attempted first degree murder that misstated Louisiana law. The instruction offered, alternatively, intent to kill *or* intent to inflict great bodily harm, although only an intent to kill satisfied the proof necessary for first attempted murder. *Id* at 268-69. In finding prejudice, the Court asked whether there was a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." *Id.* at 269. That standard requires a "probability sufficient to undermine confidence in the outcome." *Id.* (quoting *Strickland*, 466 U.S. at 694).

Similarly, in *United States v. Span, supra,* counsel was held ineffective under *Strickland*. There, counsel failed to object to an improper self-defense instruction and, like Carman's counsel, failed to submit the proper instruction - that self-defense in the face of excessive force by federal marshals was an affirmative defense. In reviewing the claim, the court explicitly rejected the faulty analysis applied by the motion court -- that plain error was necessary under *Strickland*.

The proper inquiry is whether, because trial counsel failed to submit the proper MAI, telling the jury that they "shall" consider any evidence found to be mitigating and that they need not be unanimous to consider such evidence, a reasonable probability exists that the outcome would have been different. Is there a probability sufficient to undermine confidence in the outcome? Of course.

Counsel admitted that these two missing paragraphs were critical to her defense (H.Tr.166). Indeed, she knew that the case would turn on mitigation, not guilt or innocence (H.Tr.198). Further, her argument could not overcome the faulty instructions, since the court told jurors that the arguments are not evidence and the law is contained in the instructions (D.L.F.243,257). MAI-CR3d 302.02 and 313.49. *Span, supra* at 1390; and *Gray, supra* at 270-71. The jury deliberated for five and one-half hours before deciding punishment (Tr.951-52). They were confused about what was to be considered mitigating - they requested a definition and then a dictionary (D.L.F.262-63). Under these facts, this Court *cannot* be confident that, had the jury been directed that they must consider mitigation and need not be unanimous, the outcome would have been the same.

The evaluation of the aggravating and the mitigating evidence offered during the penalty phase is more complicated than a determination of which side proves the most statutory factors beyond a reasonable doubt. *State v. Storey*, 986 S.W.2d 462,464 (Mo.banc1999). The jury is never required to impose a sentence of death. *Id.* The jury has discretion to assess life imprisonment even if mitigating factors do not outweigh aggravating factors." *Storey, supra*; *State v. Brooks*, 960 S.W.2d 479,497 (Mo.banc1997); and *Section 565.030.4(4) RSMo 1994*).

In light of this discretion, proper and complete instructions on mitigation could have changed the balance of aggravation and mitigation. Given the length of their deliberations and their confusion, had it been properly instructed, the jury could well have imposed a life sentence.

Counsel was ineffective in failing to proffer complete, accurate MAI instructions that were critical to her defense, informing jurors that they must consider mitigation and need not be unanimous. Carman was prejudiced. A new penalty phase should result.

IV. What is Mitigation?

The motion court clearly erred in overruling Carman's 29.15 motion because the trial court's failure to instruct the jury on what mitigation meant in response to their questions, and trial counsel's failure to request such an instruction, denied him effective assistance of counsel, due process, a fair trial and freedom from cruel and unusual punishment (U.S. Const., Amends. 5, 6, 8, 14) in that: once the jury made explicit its difficulty in understanding mitigation, the trial court had a duty to clear away its confusion with concrete accuracy. A death sentence should not rest on an equivocal direction to the jury on such a basic issue as what constitutes mitigation; and a jury must be allowed to consider mitigation, something impossible if they do not understand what it is. Their confusion creates the risk that the death sentence was improperly imposed and counsel unreasonably failed to request -- on the record -- a proper instruction and did not provide the court with substantive law showing that the court must define mitigation. Carman was prejudiced since, had the jurors been properly instructed on what mitigation meant, a reasonable probability exists that, they would have sentenced him to life.

Carman has been condemned to death by jurors who did not understand, let alone consider mitigation. The trial judge did not clear away their confusion with an accurate instruction. Rather, he referred them to an erroneous instruction that further confused them. Counsel did not even bother to make a record on the jury's question or her proposed response. Carman was prejudiced. The jurors deliberated on punishment for more than five hours, and at one point, they wrote a note that they were unable to render a

verdict. Thus, a reasonable probability exists that, had they been properly instructed on mitigation, they would have imposed a sentence of life without parole.

During deliberations, jurors asked:

> JURY: "What is the legal definition of mitigating (as in mitigating circumstances)?"

(D.L.F.262). The trial court responded: "Any legal terms in the instructions that have a 'legal' meaning would have been defined for you. Therefore, any terms that you have not had defined for you should be given their ordinary meaning.'" *Id.* Since this response did not clear away the jurors' confusion, they responded:

> JURY: "Can we have a dictionary?"

(D.L.F.263). The trial court responded: "No, I'm not permitted to give you one." *Id*.

Counsel wanted the court to give the jurors a definition (H.Tr.181). Yet she made no record on any request and proffered no particular instruction (H.Tr.181). She provided no authority for an instruction defining mitigation. *Id*.

The motion court denied this claim since this Court found the failure to define mitigation was not plain error (L.F. 350-1). The court also concluded that, had counsel objected, the trial court would have denied the objection, so there was no reasonable probability that the trial would have been different. *Id.*[6]

[6] The court also criticizes Carman for offering no evidence regarding the jurors' message that they were unable to reach a verdict (L.F.351). However, the court refused to allow counsel to interview jurors (L.F.37). Carman raises this issue separately, *infra.*

This Court reviews the motion court's findings for clear error. *Sanders v. State,* 738 S.W.2d 856, 857 (Mo.banc1987). To establish ineffective assistance of counsel, Carman must show that his counsel's performance was deficient and that such performance prejudiced his case. *Strickland v. Washington,* 466 U.S. 668 (1984); and *Williams v. Taylor,* 120 S.Ct.1495,1511-12 (2000). To prove prejudice, he must show a "reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *State v. Butler,* 951 S.W.2d 600,608 (Mo.banc1997).

The court clearly erred. First, its conclusion that this Court's finding of "no manifest injustice" equates with "no prejudice" is simply wrong. *State v. Storey,* 901 S.W.2d 886,901 (Mo.banc1995) (court found prosecuting attorney's improper closing argument was not plain error, but found counsel ineffective for failing to object to improper argument); and *United States v. Span,* 75 F.3d 1383,1389 (9thCir.1996) (counsel ineffective in failing to request proper self-defense instructions, even though the appellate court had not found plain error on direct appeal). Had the motion court applied the proper standard under *Strickland,* it would have found counsel ineffective.

Counsel admitted that she wanted the court to define mitigation, but failed to make a formal request thus -- preserving nothing for review. Had counsel properly objected to the trial court's failure to instruct the jury on mitigation, Carman's rights under the Sixth, Eighth, and Fourteenth Amendments would have properly been raised, first at trial and then, on direct appeal.

The Sixth Amendment right to a fair and impartial jury includes a jury properly instructed on the law. *Bollenbach v. United States,* 326 U.S. 607 (1946). In *Bollenbach,*

the jurors were confused about the charge of conspiracy. *Id.* at 609. After they had deliberated seven hours, they wanted to know: "Can any act of conspiracy be performed after the crime is committed?" *Id.* at 608-609. The trial court failed to answer the question. *Id*. Later, the court mistakenly instructed the jury on the law. *Id.*

In reversing, the Supreme Court concluded that "the judge is not a mere moderator, but is the governor of the trial. . .for determining questions of law." *Id.* at 612 (citation omitted). "Where a jury makes explicit difficulties a trial judge should clear them away with concrete accuracy." *Id.* at 612-13. The judge had no business being "quite cursory" since the jury asked for supplemental accuracy. *Id.*

Here, as in *Bollenbach*, the jurors were confused by the concept of mitigation (D.L.F.262). This was not a minor point of law. Rather, mitigation was the critical concept that would determine whether Carman would live or die. The trial judge had an obligation to clear the jurors' confusion and, as in *Bollenbach*, he not only failed to answer the question, but inaccurately directed the jurors to a flawed instruction on mitigation.

Bollenbach was decided more than 50 years before Carman's trial, yet trial counsel failed to bring this case, or any other, to the court's attention. This past term, the Supreme Court had the opportunity to overrule *Bollenbach*, but did not. *Weeks v. Angelone*, 120 S.Ct. 727 (2000). In *Weeks*, the Court found that a trial judge properly directed a capital jury's attention to a specific paragraph of an instruction that allowed the jury to consider mitigation. *Id.* Critical to the court's decision was whether the jury was given accurate instructions. Bollenbach's jury was not; Weeks' jury was. Carman's jury,

like Bollenbach's, was inaccurately instructed and their question -- what does mitigation mean - was *never* answered. "A conviction ought not to rest on an equivocal direction to the jury on a basic issue." *Bollenbach, supra* at 613. Neither should a sentence of death.

Not only was Carman denied a properly-instructed jury, since the jury did not even understand what mitigation meant, it could not properly consider and weigh it. The Eighth Amendment requires that a jury be allowed to consider any evidence in mitigation of punishment. *Lockett v. Ohio*, 438 U.S. 586,604 (1978); *Eddings v. Oklahoma*, 455 U.S. 104 (1982). And, because death is different, a corresponding need for heightened reliability in penalty phase proceedings exists. *Woodson v. North Carolina*, 428 U.S. 280,305 (1976). The risk that a death sentence be imposed arbitrarily and capriciously is impermissible. *Furman v. Georgia*, 408 U.S. 238 (1972).

Yet, here, that risk was in full flower. The trial judge was content to leave the jury in the dark although they pled for illumination on what mitigation means. They struggled with their penalty deliberation for more than five hours (Tr.951-52) and, at one point, someone penned a note saying they could not reach a verdict (D.L.F.261).

Counsel should have requested a proper instruction defining mitigation (See U.S. Const., Amends. 6,8,14). Although the motion court cursorily suggested it would have denied such a request (L.F.350-51), that denial would have constituted reversible error. Although MAI-CR3d 333.00's Notes on Use suggest that if a definition is not included in the MAIs, it should not be given, MAI-CR and its Notes on Use are "not binding" to the extent they conflict with the substantive law. *State v. Anding*, 752 S.W.2d 59,61 (Mo.banc1988); and *State v. Carson*, 941 S.W.2d 518,520 (Mo.banc1997). Indeed, a

court should decline an instruction under MAI-CR 3d or Notes on Use if it conflicts with substantive law. *Id.* The MAI-CR3d specifically provides such a caveat in its introductory comments:

> The Court has adopted these proposals without judicially deciding or foreclosing any legal, constitutional, procedural, instructional, or other issues which may arise in cases even though the procedures, instructions, and Notes on Use adopted by the Court are followed and used.

Id. *(*quoting *MAI-CR3d "How to Use This Book-Reservations" pp. ii-iii (1987)).*

Had counsel properly requested an instruction defining mitigation, the jury would have understood that they could have considered any aspect of Carman's character - any circumstance proffered as a reason for a sentence less than death. Without such an instruction, this Court cannot have confidence in the outcome. Counsel was ineffective. Carman's constitutional rights to due process, a fair trial and reliable sentencing were violated. A new penalty phase should result.

V. Postconviction Counsel Was Not Allowed to Talk to Jurors

The motion court abused its discretion in denying Carman's request to interview jurors pursuant to local court Rule 53.3 because the absolute prohibition denied him a fair and impartial jury, due process and freedom from cruel and unusual punishment (U.S. Const., Amends. 6,8,14), in that questioning jurors was necessary to prove the constitutional claims of juror misconduct, ineffective assistance of counsel, and the invalidity of Carman's death sentence. Under Local Rule 53.3, Carman had shown good cause for the interviews, based on the jury's notes during their deliberations. To interpret Rule 53.3 to allow a blanket prohibition against any post-trial interviews renders the rule unconstitutional.

The motion court's blanket prohibition against any juror interviews, under Local Rule 53.3 cannot stand. Without such interviews, Carman was precluded from developing and proving the constitutional violations in state court. This Court should remand to give Carman a reasonable opportunity to develop, litigate and prove his claims.

Facts At Trial Showed the Need to Interview Jurors

At sentencing, counsel asked for a new penalty phase because of the jury's confusion regarding mitigation (Tr. 954-56). Counsel had submitted erroneous instructions about mitigation (Tr. 950-5). The jury's note asking for a definition of mitigation showed they did not understand this legal concept (D.L.F.262;Tr. 963). When the judge refused to provide a definition, the jury asked for a dictionary (D.L.F.263). At one point, a juror penned a note saying they were unable to reach a verdict (D.L.F. 261).

To prove prejudice, counsel called Dr. Wiener, a Professor of Psychology who has studied jurors' comprehension of MAIs in death penalty cases (Tr. 979-1061). The prosecutor objected to his testimony because it did not involve the actual jurors in this case (Tr. 973). The prosecutor continued to complain: "We don't know about this jury" (Tr. 976). He observed: "Not a single juror on this jury was questioned" (Tr. 979). Counsel's request that Dr. Wiener interview the jurors was denied (Tr. 1061).

On appeal, this Court discounted Dr. Wiener's study "because the people interviewed for the study did not act as jurors." *State v. Deck*, 994 S.W.2d 527,542 (Mo.banc1999).

Post-conviction Proceedings

Before Carman's amended motion was due, post-conviction counsel moved for leave to contact and interview petit jurors (L.F. 30-36). Counsel quoted one of the jury's notes and stated that counsel needed to investigate potential juror misconduct (L.F.31). Counsel was forced to obtain permission from the Court because the Local Court Rule 53.3. provides:

> During a juror's term of service, counsel and parties shall not question a juror regarding a particular case without first obtaining leave of Court upon good cause shown.
>
> (a) Questionnaires designed to elicit information from jurors for the purpose of gaining insight into the jury process and for education purposes may be approved by the Court en banc.

(b) While a juror may be questioned about relevant matters of fact, under appropriate circumstances, one may not probe into or compromise the mental processes employed in formulating the verdict in question. To do otherwise would be to open the deliberation process to frivolous attacks upon its dignity and integrity and interrupt its ordinary and proper functioning.

53.3.2 General questions of an abstract nature unrelated in context to a particular case may be addressed to a juror after his or her service, i.e. at the end of the term in which said juror served. Such post service interview need not have leave of Court but shall not include matters proscribed by subparagraph 53.3.1(b) above.

The motion court denied the request, prohibiting any contact with jurors (L.F. 37). Then, in denying relief on the amended motion, the court ruled:

There was one remaining argument put forth by Movant under this paragraph, relating to an alleged unsigned, and undelivered, message from the jury about their inability to reach a verdict. Suffice to say that no evidence regarding this alleged incident was adduced in this action. That sub-point is therefore deemed abandoned.

(L.F. 350-51).

Legal Standards

The right of a criminal defendant to be tried by a jury is one of the most significant guaranteed by our Constitution. *Remmer v. United States,* 350 U.S. 377,379 (1955). A

defendant has a right to be tried by an impartial jury, unprejudiced by extraneous influence. *Id.* When reasonable grounds exist to believe that the jury may have been exposed to such an influence, questioning of jurors must be broad enough to permit "the entire picture" to be explored. *Id.*

Consistent with *Remmer*, this Court has recognized "proper subjects of inquiry to jurors" after trial include potential juror misconduct. *State v. Jones*, 979 S.W.2d 171,183(Mo.banc 1998). And, while a motion court has discretion to limit contact with jurors, *Jones, supra,* it cannot prohibit it.

The United States Supreme Court has ruled that issues of juror misconduct should be litigated in state post-conviction proceedings. *Williams v. Taylor*, 120 S.Ct. 1479, 1492-94 (2000). In *Williams*, a juror failed to disclose her bias during voir dire. *Id*. at 1492. The claim was not raised in state court, but the juror provided an affidavit in the federal habeas proceedings. *Id*. at 1492-93. The Court found that juror misconduct claim could result in federal constitutional violations. *Id.* at 1493. At an evidentiary hearing, Williams could establish that juror was not impartial under the Sixth and Fourteenth Amendments. *Id.* (citing *Smith v. Phillips*, 455 U.S. 209,217,219-21(1982)). A juror's silence could so infect the trial as to deny a defendant due process. *Williams, supra* (citing *Donnelly v. DeChristoforo,* 416 U.S. 637,647(1974)).

The Court excused Williams' failure to raise the claim in state court because the Commonwealth had precluded jury investigation. *Williams, supra* at 1493. Without allowing investigation of the factors surrounding the misconduct, the defendant could not develop the claim. *Id.* The Court concluded that "if the prisoner has made a reasonable

effort to discover the claims to commence or continue state proceedings, §2254(e)(2) will not bar him from developing them in federal court." *Williams, supra* at 1494.

As in *Williams*, Carman tried to investigate his claim of juror misconduct, but the motion court denied him the opportunity, imposing a blanket prohibition on juror contact. This prohibition was an abuse of discretion.

Missouri decisions have also implicitly found blanket prohibitions to be an abuse of discretion. In *State v. Babb*, 680 S.W.2d 150, 152 (Mo.banc1984), this Court ruled that jurors at a motion for new trial hearing may testify regarding the presence or absence of outside influences. Similarly, in *State v. Harvey*, 730 S.W.2d 271,272 (Mo.App.E.D.1987), two jurors testified at a motion for new trial hearing about juror misconduct. The sequestered jurors had reconnected a radio-television in the motel room and heard television newscasts of the trial in violation of the Court's instruction. *Id*. at 272-73. The inconvenience to the jurors was outweighed by the interest in ensuring that the defendant had received a fair trial. *Id*. at 276.

Post-trial contact with jurors is not limited to motion for new trial proceedings. In *Lytle v. State*, 762 S.W.2d 830,834 (Mo.App.W.D.1988), a jury foreman testified at a Rule 27.26 proceeding on the issue of shackling.

Carman's jurors, too, may have engaged in misconduct. The record establishes that they did not understand what mitigation. The issue, then, is whether they went outside the evidence and the instructions. *See e.g. McCray v. State*, 565 So.2d 673,674-5 (Ala.Cr.App.1990) (juror misconduct established by reading portion of Alabama pattern instructions and juror's resulting directive that jurors could not convict defendant of a

lesser crime); *Moore v. State*, 324 S.E.2d 760,761-62 (Ga.App.1984) (juror's study of part of a law book on the topics of murder and voluntary manslaughter and subsequent interpretation to rest of jury during deliberations was misconduct requiring reversal); and *Rasbury v. State*, 832 S.W.2d 398, 400-02 (Tx.App.1992) (juror misconduct established by juror who professed to know the law of self-defense but misstated the law to a juror holding out for a not guilty verdict).

As with *McCray*, *Moore*, and *Rasbury*, Carman's case is ripe for misconduct. The jurors did not understand the law regarding mitigation. At some point, a juror wrote a note saying they were unable to agree upon a verdict. Did they find a pattern instruction in the courtroom to read as in *McCray*? Did a juror read a book or article on the topic and provide her interpretation to the rest of the jury as in *Moore*? Did one juror profess to know the law on mitigation but misstate it to others - those holding out for a life verdict, as in *Rasbury*? These questions cannot be answered because the motion court prohibited *all* contact. This Court should remand so that the claim of juror misconduct can be investigated.

To interpret Local Rule 53.3 as allowing a blanket prohibition would be unconstitutional. *Sears v. State*, 493 S.E.2d 180 (Ga.1997) (trial court improperly restricted Sears from contacting jurors to investigate claim of misconduct); and *State v. Thomas*, 813 S.W.2d 395 (Tn.1991) (local rule prohibiting post-trial communications with jurors except with permission of trial court held unenforceable).

In *Sears*, *supra* at 187, the trial court banned post-trial interview of jurors, until Sears proffered what he hoped to learn by such interviews. "Jurors are competent to

testify about improper influences that intrude upon their deliberations." *Id.* "The possibility that information learned from jurors may not require a new trial should not preclude appellate counsel from exploring all avenues of challenge." *Id*. The trial court's order that counsel disclose what such contact would uncover placed an impossible burden on counsel. *Id.* The Court found error in the prohibition and remanded to allow contact with jurors. *Id.*

Similarly, in *State v. Thomas*, 1990 WL29286 at 7 (Tenn.Cr.App.1990), a local court rule limited contact with jurors except with the court's permission. As here, counsel moved for permission to interview the jurors. *Id.* The motion was denied. *Id.* The appellate court stated the obvious, "the only way to learn of outside influences in juror disqualification may be from talking to those who served on the jury." *Id.* The appellate court recognized the importance in safeguarding impartiality, essential to the judicial process. *Id.* at 8.

The motion court abused its discretion by prohibiting any contact with jurors. It further erred in denying Carman's claims because he had not presented evidence regarding the jurors. This Court should reverse and remand with instructions that Carman be allowed to contact jurors, amend the motion, under Rule 29.15, with juror misconduct claims, and present those at an evidentiary hearing.

VI. Prosecutor's Inflammatory Argument

The motion court clearly erred in denying Carman's claims that trial counsel was ineffective for failing to object to the prosecutor's improper argument and that the argument violated Carman's right to due process, a fair trial, and freedom from cruel and unusual punishment (U.S. Const., Amends. 5,6,8,14) in that the prosecutor's suggestions that jurors think about someone pointing a gun to their head for ten minutes was improper personalization; that they give the victims' family justice allowed the victims' family to recommend a death sentence; and that the victims were more worthwhile than Carman was improper since it encouraged the jury to weigh the value of lives. Carman was prejudiced by the improper argument as it injected emotion and caprice into the jury's determination of punishment.

In case after case, this Court has declared that prosecutors should not personalize asking jurors to put themselves in the victims' place. *See e.g.*, *State v. Storey*, 901 S.W.2d 886, 901(Mo.banc1995); *State v. Rhodes*, 988 S.W.2d 521,528-29 (Mo.banc1999). This Court has condemned closing argument that encourages the jury to decide the case on emotion. *State v. Taylor*, 944 S.W.2d 925,937 (Mo.banc1997). Prosecutors have been warned not to weigh the victim's and defendant's lives. *Storey, supra* at 902. Prosecutors must not tell jurors that the victim's family wants a sentence of death. *Taylor, supra* at 938. Yet, all these improper arguments were made without objection at Carman's trial. A new penalty phase should result.

During penalty phase, the prosecutor argued:

> I want you to think about Carmen Deck pacing for ten minutes. Mr. Jerrell suggested that you count out ten minutes and you think about how long that is and *then think about somebody pointing a gun at your head at the same time*.

(Tr.948) (emphasis added). Counsel failed to object. The claim of error, thus, was reviewed only for plain error on direct appeal. *State v. Deck*, 994 S.W.2d 527,544 (Mo.banc1999).

The prosecutor also argued:

> Carman Deck doesn't want justice, he wants a break. *These folks want justice. These folks deserve justice. These folks deserve justice (holds up exhibit) and you twelve individuals are the only people that are going to give it to them.*

(Tr.946) (emphasis added). Again, counsel failed to object this improper argument although it was a direct appeal to the family's desire for a death sentence.

Throughout the argument (Tr.946-50), the prosecutor asked that the jury compare the victims -- upstanding, respected members of the community -- to Carman, "a petty thief, an inept burglar and multiple killer (Tr.946). His argument was repeated and direct: "substitute" the victims into the speech about the sanctity of life (Tr.947); compare Carman with the Longs (Tr.948); the victims had lived in the community for 50 years, raised a family, have people all over the community, in contrast to Carman "this interloper" (Tr.949) and remember the legacy of the Longs versus Carman's (Tr.950).

Counsel failed to object to this argument although it was as improper appeal to emotion, to weigh the value of the victims and Carman's life or a call to impose the sentence desired by the victims' family (Tr.947-50).

Counsel acknowledged the "gun to the head" argument was improper and had no reason for not objecting (H.Tr.167-68). As for "these folks want justice," counsel could not say whether she should have objected and thought it could go either way (H.Tr.168). She did not recognize the "weighing lives" basis for an objection (H.Tr.168-69).

The motion court found "the gun to the head" argument came close to personalization, but did not find it overstepped the boundaries of legitimate argument (L.F.346). It found the argument was not objectionable and did not prejudice Carman since it did not rise to the level of manifest injustice. *Id.* The motion also denied the "these folks want justice" claim and the repeated comparisons between Carman and the victims and their relative worth (L.F.346-47). The court stated the amended motion took the statements out of context, counsel made some objection, the argument was a proper rebuttal and comment on victim impact evidence (L.F.347).

This Court must review the motion court's findings for clear error. *Sanders v. State,* 738 S.W.2d 856, 857 (Mo.banc1987). To establish ineffective assistance, Carman must show that his counsel's performance was deficient and that it prejudiced his case. *Strickland v. Washington*, 466 U.S. 668 (1984); *Williams v. Taylor*, 120 S.Ct. 1495,1511-12 (2000). To prove prejudice, Carman must show a "reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *Id;* and *State v. Butler*, 951 S.W.2d 600,608 (Mo.banc1997). Counsel can be ineffective for failing to

object to prejudicial argument, *Copeland v. Washington*, 232 F.3d 969,974-75 (8thCir.2000); *State v. Storey*, *supra* at 901.

The motion court's findings and conclusions are clearly erroneous. In both *Storey* and *Rhodes*, this Court condemned argument that asked jurors to put themselves in victims' place. In *Storey*, the argument was:

> Think for just this moment. Try to put yourselves in Jill Frey's place. Can you imagine? And, then - and then, to have your head yanked back by its hair and to feel the blade of that knife slicing through your flesh, severing your vocal cords, wanting to scream out in terror, but not being able to. Trying to breathe, but not being able to for the blood pouring down into your esophagus.

Storey, *supra* at 901. Similarly, in *Rhodes*, the prosecutor argued:

> Try, try just taking your wrists during deliberations and crossing them and lay down and see how that feels (demonstrating). Imagine your hands are tied up . . . And ladies and gentlemen, you're on the floor, and you're like that, with your hands behind your back, and this guy is beating you. Your nose is broken. Every time you take a breath, your broke rib hurts. And finally, after you're back over on your face, he comes over and he pulls your head back so hard it snaps you neck.. . Hold your breath. For as long as you can. Hold it for 30 seconds. Imagine it's your last one.

Rhodes, *supra* at 528.

Here, the argument asked the jurors to think about waiting for ten minutes while someone pointed a gun to their head (Tr. 948). The only difference in these three cases was the method of killing; the personalization is identical. The motion court erred in finding no error.

The motion court also suggested that, since the argument did not result in a manifest injustice under plain error review, it could not be prejudicial under *Strickland*. This conclusion is contrary to *Storey, supra* at 901, which found ineffective assistance in failing to object to improper personalization, even though the argument did not warrant plain error relief.

Here, counsel had no reason for not objecting. She conceded that the argument was improper. The argument was prejudicial -- it was designed to arouse the jurors' fears and encouraged them to decide the case on their emotions.

Counsel also failed to object when the prosecutor pointed to the victim's family and said "these folks want justice." To suggest that the family wanted death was improper. *Taylor, supra* at 938 (under *Payne v. Tennessee*, 501 U.S. 808,830 n.2,833 (O'Connor, J., concurring) and 835 n.1 (Souter, J., concurring) (1991), it is improper for the victim's family to ask for a death sentence). Surely, if the jury cannot ask for a death sentence while testifying, the prosecutor may not tell the jurors they desire it as they sit in the courtroom.

The inflammatory argument was not limited to these two incidents. Rather, the entire closing penalty phase argument compared the victims and Carman and their respective worth (Tr.946-50) This Court has condemned such an argument in *Storey,*

supra. Counsel failed to recognize the error and so did the motion court (L.F.347). Counsel objected twice to portions of arguments on different grounds, but these objections did not cure the prejudice. The jury was never told it was improper to weigh the value of Carman and the victims' lives. Indeed, the prosecutor continued to encourage them to weigh, even after the one objection was sustained (Tr.948).

Carman was prejudiced. The jury deliberated for more than five hours (Tr.951-52). Reasonable probability exists that the improper argument injected emotion and caprice and denied Carman a fair trial. Indeed, the argument was similar to that condemned in *Copeland*, *supra* at 972. In *Copeland*, the rebuttal argument emphasized the impact of the crime on the victims' families. *Id.* The closing argument was brief, with the improper argument making up the core of the closing. *Id.*

As in *Copeland*, this closing argument was brief, spanning only 4 1/2 pages. Nearly all of the argument compared the victims and Carman. *Id.* Like *Copeland*, this Court should condemn the argument and reverse for a new penalty phase.

VII. Appellate Counsel Was Ineffective

The motion court clearly erred in denying the Rule 29.15 motion because Carman was denied effective assistance of counsel (U.S. Const., Amends. 6 and 14), in that appellate counsel failed to raise the trial court's error in overruling the defense motion to disqualify the prosecuting attorney's office due to a conflict of interest caused by an assistant prosecutor's prior representation of Carman since: the claim had significant merit; the law supported the claim; the claim was preserved for review; and appellate counsel pursued weaker issues, including three claims based on the plain error standard of review, claims alleging an abuse of discretion in failing to declare mistrial, and a "reasonable doubt instruction" challenge that has been repeatedly rejected. The motion court clearly erred in ruling Carman must show actual prejudice, since an appearance of impropriety merits reversal.

Before trial, Carman's counsel moved to disqualify the prosecutor's office due to a conflict of interest (D.L.F. 67-68). Only three years before the charged offense, Troy Cardona, one of the Assistant Jefferson County Prosecutors, had represented Carman on a charge of burglary (Tr. 9, 12). Additionally, while he represented Carman, Cardona was supervised by Mark Fried, now the First Assistant at the Jefferson County Prosecutor's Office (Tr. 10). Cardona said that he had not communicated any information to the prosecutors regarding Carman and he had no involvement in this prosecution of Carman (Tr. 9, 12, 14, 15-16). The trial court overruled the motion to disqualify (Tr. 19, D.L.F. 69). Trial counsel included the claim of error in the motion for new trial (D.L.F. 269-70).

Appellate counsel did not raise this claim on direct appeal (Ex. 70). Counsel decided not to raise the issue because she could not find any cases to support the claim (H.Tr. 49-51). Counsel would have liked to include the point and thought it would have fit into her theory that the trial was not fair (H.Tr. 51-52).

The motion court rejected this claim of appellate counsel's ineffectiveness, concluding that Carman could not establish prejudice, as the evidence would have been equally strong with another prosecutor and the prior conviction would not have changed (L.F. 351).

This Court must review these findings to determine whether the motion court clearly erred. *Sanders v. State*, 738 S.W.2d 856,857 (Mo.banc1987). Carman was entitled to effective assistance of counsel on his first appeal of right. *Evitts v. Lucey*, 469 U.S. 387 (1985); *State v. Sumlin*, 820 S.W.2d 487,490 (Mo.banc1991). The standard for effectiveness of appellate counsel is the same for trial counsel: the movant must show that appellate counsel's performance was deficient and that it prejudiced his case. *Strickland v. Washington*, 466 U.S. 668 (1984); *Sanders, supra.* Counsel need not raise every possible claim on appeal, but the "failure to raise a claim that has significant merit raises an inference that counsel performed beneath professional standards." *Sumlin, supra* at 490.

The presumption of reasonableness afforded an appellate attorney can be overcome if she neglected to raise a significant and obvious issue while pursuing substantially weaker ones. *Bloomer v. United States*,162 F.3d.187,193 (2nd.Cir.1998). Other factors to consider include whether the error was objected to at trial and whether

the omission was a reasonable strategic decision. *Mapes v. Coyle,* 171 F.3d. 408,427-28 (6thCir.1999).

Appellate counsel was ineffective. The conflict of interest claim had significant merit. Years earlier, this Court decided *State v. Ross,* 829 S.W.2d 948 (Mo.banc1992), in which the defendant was sued in tort by his assault victim. *Id.* at 949. Two members of the law firm that represented him also worked part-time as county prosecutors. *Id.* No evidence suggested communication between the law firm members and the members of the prosecuting attorney's office who worked on the criminal case. *Id*. Nevertheless, this Court ruled that, even without a showing of actual prejudice, the appearance of impropriety required reversal. *Id.* at 951-2.

Similarly, in *State v. Reinschmidt*, 984 S.W.2d 189, 192 (Mo.App.S.D.1998), the court found reversible error for failing to disqualify the prosecutor's office based on a conflict of interest. As in Carman's case, the defendant's former criminal defense attorney joined the prosecuting attorney's office. *Id.* at 190. Former defense counsel submitted an affidavit stating that she had no involvement with the prosecution of appellant's case and had disclosed no confidential communications or information within the prosecutor's office. *Id*. The Court concluded that the appearance of impropriety was so great that the prosecuting attorney's office should have been disqualified, counsel's affidavit not withstanding. *Id. See also State v. Croka,* 646 S.W.2d 389 (Mo.App.W.D.1983) (conflict of interest found where former defender becomes member of prosecutor's office); *State v. Boyd*, 560 S.W.2d 296,298 (Mo.App.W.D.1977) (due process and fair trial rights require no unfair advantage to the prosecution due to a prior

professional relationship *between a member of its staff* and a criminal defendant concerning the same or closely related matter).

Federal cases also supported this claim. *See Wilkins v. Bowersox*, 933 F.Supp. 1496,1523 (W.D.Mo.1996), *affirmed by Wilkins v. Bowersox*, 145 F.3d 1006 (8thCir.1998); *State v. Stenger*, 760 P.2d 357 (Wa.banc1988); *Reaves v. State*, 574 So.2d 105,107 (Fla.1991). All of these cases, decided before Carman's appeal, had found a conflict of interest where a lawyer who represented a defendant later prosecuted him and sought death. *Id.*

Carman recognizes that *after* his direct appeal was decided, this Court decided *State v. Smith*, 32 S.W.3d 532,541-43 (Mo.banc2000), holding the prosecutor's status as defendant's defense counsel in two prior cases did not *require* disqualification.[7] However, in *Smith*, the representation had occurred 14 and 16 years before that case. *Id.* at 541. Here, the offenses were close in time -- raising the appearance of impropriety deplored in *Ross*. Additionally, Carman was charged for burglaries in both cases, one of the charged offenses. The prosecutor argued his prior criminal history as a basis for a death sentence, calling Carman "a petty thief, an inept burglar" (Tr.946). Under these facts, a disqualifying conflict existed.

[7] Since *Smith* was not decided when appellant counsel briefed the issues, it was not part of her review of the law and the reasonableness of her actions. However, a discussion is included because of the prejudice prong of *Strickland*.

Since the conflict of interest claim had merit and was preserved for review, Counsel's failure to raise it on direct appeal was unreasonable, especially since she pursued much weaker and unpreserved claims. A review of counsel's brief shows that eleven points were raised: three for plain error (Ex. 70, at 14,16,22); two for error in not granting a mistrial (Ex. 70 at 21,22); and one challenging the reasonable doubt instruction (Ex. 70 at 24-25), a claim repeatedly rejected by this Court. *State v. Deck*, 994 S.W.2d 527,544 (Mo.banc1999).

The motion court clearly erred in denying this claim. Carman showed that the claim had significant merit. *Sumlin, supra.* Since the conflict of interest claim did not require a showing of actual prejudice, *Ross, supra*, the motion court erred in requiring such a showing. A new trial should result.

VIII. Rule 29.15 Time Limits and the AEDPA

The motion court clearly erred in ruling that 29.15 is constitutional, because the unreasonably short time limits violate the Due Process Clause of the 14th Amendment in that the 90-day time limit is very short, petitioner must proceed *pro se*, the Rule has no justifiable excuse provision, and state habeas provides no viable alternative to Rule 29.15 as it is limited to rare and exceptional circumstances resulting in a manifest injustice. Thus, the Rule does not provide a reasonable opportunity to present issues involving federal constitutional rights and is especially unfair given the limited and deferential review in federal court under AEDPA.

Carman's amended motion alleged that the time limits of Rule 29.15 are unconstitutional because they do not permit reasonable access to courts and act to deny counsel at a critical stage in violation of the 5th, 6th, 8th, and 14th Amendments as to the United States Constitution (L.F. 191-201). The motion court denied this claim, citing *Day v. State*, 770 S.W.2d 692,695 (Mo.banc1989), stating the law was well-settled (L.F. 356).

Appellant recognizes that this and other courts have ruled the 90-day time period constitutional. *Day, supra; Duvall v. Puckett*, 15 F.3d 745,746, n.6 (8thCir.1994). However, this Court should revisit this issue in light of the Anti-Terrorism and Effective Death Penalty Act (AEDPA) which severely limits the claims that can be brought in federal court and provides for deferential review in federal court. *See e.g*., *Williams v. Taylor*, 120 S.Ct. 1495,1523 (2000) (Section 2254 (d) (1), allows a federal court to grant a writ of habeas corpus only if the state court adjudication resulted in a decision that (1)

was contrary to clearly establish federal law as determined by the United States Supreme Court or (2) involved an unreasonable application of clearly established federal law as determined by the United States Supreme Court).

In light of the limited review in federal court under the AEDPA, this Court should reconsider whether Rule 29.15 (b) and (g)'s 90-day time limit provides a reasonable opportunity to investigate and present an issue involving a federal constitutional right, as required under the Due Process Clause of the Fourteenth Amendment. *Reece v. Georgia*, 350 U.S. 85 (1955).

A similarly restrictive time limit has been held inadequate to pose a state procedural bar. *Hoffman v. Arave*, 236 F.3d 523 (9thCir.2001). There, the court reviewed Idaho Code § 190-2719, which required that all challenges to a sentence or conviction in a capital case be filed within 42 days of entry of judgment. *Hoffman, supra* at 532-33. Since the trial attorneys handled the appeals, the petitioner was effectively without counsel to help with the petition. *Id.* at 533-34. The Court concluded that this deadline severely limited the petitioner's opportunity for a hearing on and determination of a constitutional right and was thus unforceable. *Id.* at 534.

Missouri's Rule 29.15 time limit to initiate the action, like Idaho's, is unreasonably short. And, as in Idaho, Missouri's petitioners must proceed *pro se.*

Further, Rule 29.15 has no justifiable excuse or excusable neglect provision to allow a defendant to show that his failure to assert a timely constitutional challenge resulted from of circumstances beyond his control. *See People v. Germany*, 674 P.2d 345,354 (Colo.1983). Indeed, this Court has ruled that the time limits are jurisdictional.

Day, supra. State habeas does not provide a viable alternative, because it has been limited to rare and exceptional circumstances that result in a manifest injustice. *State v. ex rel. Simmons v. White*, 866 S.W.2d 443,446 (Mo.banc1993).

Given the limited review of federal claims under AEDPA, state courts must ensure that all federal constitutional claims can be fully litigated in state court. Rule 29.15 time limits do not provide this opportunity. Should this Court not grant relief on any other grounds, this Court should rule the time limits unconstitutional and remand for further proceedings.

CONCLUSION

Based on the arguments in Points I-IV, VI, Carman requests this Court reverse and remand for a new penalty phase, Point VII, reverse and remand for a new trial and Points V and VIII, reverse and remand for additional 29.15 proceedings, sufficient to conduct a full investigation and an opportunity to present evidence regarding all the issues in the case.

Respectfully submitted,

_____

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CERTIFICATE OF SERVICE

I hereby certify that on this _____ day of _____, 2001, one true and correct copy of the foregoing brief and floppy disk(s) containing a copy of this brief was hand-delivered to the Office of the Attorney General, Missouri Supreme Court Building, Jefferson City, Missouri 65102.

_____

Melinda K. Pendergraph

Certificate of Compliance

I, Melinda K. Pendergraph, hereby certify as follows:

The attached brief complies with the limitations contained in this Court's Special Rule 1(b). The brief was completed using Microsoft Word, Office 2000, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certification, and the certificate of service, the brief contains _____ words, which does not exceed the 31,000 words allowed for an appellant's brief.

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Melinda K. Pendergraph

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